Striking a Sensible Balance on the Legality of Defensive First Strikes

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ABSTRACT

This Article seeks to develop a clear and sensible legal standard governing defensive first strikes writ large in inter-state conflicts. Imprecise or improperly gauged legal parameters can contribute to an increased risk of hostilities, whether due to abuse, error, or even reasoned calculation. The implications of such conduct for states and their populations alike can be enormous. Although many proposals posit constructive guideposts for such a standard, they tend to be either abstract in structure or limited in material application. This Article sets forth a legal standard that aims to be simultaneously systematic in approach, comprehensive in scope, and functional in operation—all while embracing the elemental virtues of clarity and realism. After defining the presumptive baseline standard, the Article sets forth a legal policy framework upon which to erect a standard premised on several key attributes and contemporary security circumstances while fostering legal legitimacy and diminishing the incidence of armed conflict. The specific proposal for reform consists of three substantive elements: an evidentiary standard, a set of procedural safeguards, and a standard of review. The Article also compares the prevailing standard with the proposed standard and evaluates the latter's prospects for adoption.

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I. INTRODUCTION

Suppose there are two medium-sized rival states, Alpha and Delta, with rapidly deteriorating political relations. Suppose further that Alpha suddenly made explicit threats of attack while deploying forces in unprecedented numbers along their common border. At what point, if any, should Delta be permitted unilaterally[1] to strike first in self-defense? What criteria should govern such a decision? What level of confidence or evidentiary proof must Delta have that Alpha is preparing to launch an attack? Should Delta be required to attempt a peaceful means of resolution before resorting to force and, if so, to what extent? What parameters should guide the nature, scale, and targeting of the defensive strike itself? What standard of review should the international community apply to determine the lawfulness of the actions taken?

Should it make a difference whether Alpha and Delta each possess highly sophisticated arsenals with deterrent capability or a considerable disparity in military capabilities exists between them? Should it matter whether Alpha was suspected of mounting a conventional ground attack against Delta, dispatching a military unit to initiate a campaign of "pin-prick" attacks[2] against Delta, or launching a short-range missile with a nuclear warhead against one

1. The term "unilateral" in this context has a dual meaning. First, it connotes the exercise of "individual" self-defense (i.e., by a single state) as opposed to "collective" self-defense (i.e., joint or multilateral). Second, the term is intended to signify an action undertaken absent a determination by the U.N. Security Council, which, unlike states, is expressly permitted to authorize force to address emerging threats (known as "collective security"). U.N. Charter arts. 39, 42. Issues arising under collective self-defense or collective security lie outside the scope of this Article.

2. Pin-prick strikes are low-intensity assaults that are typically part of a pattern or series and are being employed with increasing frequency around the globe. This Article addresses the legal implications of pin-prick strikes in several analytical contexts.

of its metropolitan areas? Would the situation be viewed differently if Delta was a small nation with a population distribution such that its very survival was jeopardized by Alpha's threat? This Article seeks to provide an analytical framework for tackling these and related normative questions.

Specifically, this Article aims to develop a clear, practicable legal standard to govern the use of first strikes in self-defense in inter-state conflicts.[3] This type of action is referred to herein as "proactive self-defense," which is intended to operate as a value-neutral, umbrella term capturing the full range of recognized nonreactive forms[4] of self-defense: interceptive,[5] anticipatory,[6] and preemptive.[7] A single designation not only provides a convenient label for such wide-ranging conduct but also overcomes any confusion that can derive from the uncertain and often overlapping definitions applied to its component concepts. Although other phrases may convey a

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3. This Article is exclusively concerned with relationships between states. Accordingly, it does not address defensive first strikes launched against either U.N. forces or non-state actors (e.g., terrorist groups) unless, in the latter case, state attribution can be shown. Although some features of this analysis may apply equally to self-defensive force against non-state actors, the dynamics of such conflicts are distinct and therefore the overall approach outlined in this Article is not necessarily replicable. In addition, because the Article's focus is more precisely between perceived aggressor states and defending states, the legal permissibility of any self-defensive force affecting a neutral third state is beyond the scope of this inquiry.

4. Reactive self-defense is the use of force taken to defend oneself after suffering a blow; by contrast, nonreactive measures are those taken beforehand. Excluded from this typology is "preventive self-defense," which, because it occurs under remote and indefinite circumstances, bears greater resemblance to an offensive than a defensive posture. *See* David A. Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 523, 531 n.36 (2009).

5. Interceptive self-defense entails a military response to an attack that has commenced but has not yet been consummated, i.e., it is being mounted, has been launched but not yet crossed the target state's territorial boundary, or in any event irrevocable actions are underway. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 191 (4th ed. 2005).

6. A state exercises anticipatory self-defense when it "beats its enemy to the punch" by launching an attack against a state that has manifested its capability and intent to attack imminently. The latter state tends to be in the final preparations for an attack through maneuvers or deployments. Under this posture, an "armed attack" is on the "brink of launch" and the defending state chooses to launch one of its own first. MARY ELLEN O'CONNELL, AMERICAN SOCIETY OF INTERNATIONAL LAW TASK FORCE ON TERRORISM, THE MYTH OF PRE-EMPTIVE SELF-DEFENSE 2 n.10 (2002), *available at* http://www.asil.org/taskforce/oconnell.pdf.

7. The underlying purpose of preemptive self-defense is to eliminate an apparently escalating military threat even though, at the moment, it remains entirely conjectural. In essence, a defending state seeks to "forestall processes" that in the near-term "may in the future develop into highly intense coercion or violence" by striking "while these processes still embody only a low level of coercion." MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 210–11 (1961). Such self-defense is still principally defensive in character, although it also may be dictated in part by strategic motives, such as maintaining a balance of power. Sadoff, *supra* note 4, at 531.

comparable meaning, the utility of this term stems from its nomenclature parallel to other forms of self-defense, its affirmative orientation, and its lack of potential misidentification with other similar-sounding terms such as "preemptive strike" and the more narrowly defined and distinct concept of "preemptive self-defense."

Many legal standards have been recommended or applied over the years concerning the nature and scope of proactive self-defense. Those standards run the gamut from the formula enunciated by U.S. Secretary of State Daniel Webster in 1841 in connection with the *Caroline* incident[8] to the doctrine promulgated in the Bush Administration's National Security Strategy of 2002.[9] Many of these proffer helpful guideposts for assessing a state's use of proactive defensive force but, as a rule, they tend to fall into one of two categories: (1) generalized standards, reminiscent of political science views, consisting of briefly enumerated elements that nevertheless encompass a holistic view of the international threat environment;[10]

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8. The *Caroline* incident is examined in Part II *infra*. Some would argue that the lower bound of this continuum is not the Webster formula at all, but rather interceptive self-defense. That concept, however, has only the slimmest margin of practical applicability; indeed, there is virtually no historical instance in which such defensive force has ever been exercised. Moreover, given the character of the underlying attack, the term arguably is more consonant with *reactive* self-defense. Guy B. Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT'L L. 243, 275 (1987).

9. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Sept. 17, 2002, *available at* http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf [hereinafter NSS 2002]. The use of force strategy outlined therein, which has come to be commonly known as the "Bush Doctrine," is perhaps less a "proposal" for international consideration than a policy statement. That said, it is quite likely that the statement was also designed to provide a template for other, particularly similarly situated, states in fashioning their counter-terrorism and counter-proliferation policies. This targeted strategy applies to "rogue states and terrorists" alike, and argues that certain threats have become so significant that the United States can ill-afford to wait for those threats to fully materialize before taking action. *Id.* at 15. The proffered alternative—"preemptive" self-defense—calls for the use of force to "eliminate a specific threat" before an attack actually occurs "even if uncertainty remains as to the time and place of the enemy's attack" and even "before [such threats necessarily] are fully formed." *Id.* at 15–16; George W. Bush, *Prefatory Letter*, *in* NSS 2002, *supra*. This approach constitutes a "considerable expansion of the existing boundaries of international law." JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 147 (2004).

10. *See, e.g.*, The Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, ¶¶ 207, 209, U.N. Doc. A/59/565 (Dec. 2004) [hereinafter *High-Level Panel Report*] (expressing hope that states would subscribe to its five minimum criteria to be taken into account when "considering whether to authorize or endorse the use of military force"); WILLIAM V. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 133 (1981) (postulating a three-part test to govern anticipatory self-defense); Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209, 221–24 (2003) (advancing four "factors and circumstances related to establishing the legitimacy of using [preemptive self-defense] under international law principles and UN Charter values").

or (2) fairly detailed, legally-based frameworks whose scope is tailored to address only a single type of threat.[11] Some recommendations, however, are both abstract in structure and limited in material application.[12]

Although each of these proposals is valuable in its own right for advancing the dialogue and identifying priority concerns and criteria, the abstract proposals lack necessary detail and, as a result, are of less utility in framing a meaningful legal standard, while others may provide the requisite granularity but are too limited in scope to be of general use. This Article seeks to build upon the strengths of earlier proposals and set forth a legal framework that aims to be, at once, systematic in approach, comprehensive in scope, and functional in operation—all while faithful to the cardinal virtues of clarity and realism.

It is worth pausing momentarily to address the various needs for a clear and meaningful legal standard, particularly its application in the context of militarized states that might well prefer the more ambiguous standard of the status quo. First, a clear and meaningful legal standard would diminish the likelihood that a state will launch a strike out of confusion or ignorance of the governing standard or that a state will rely on legal ambiguity to support unilateral military measures on pretextual grounds. Second, a clear standard would enable third parties and the international community at large to effectively distinguish between legitimate and illegitimate actions, and to cast their military and diplomatic support accordingly behind the state whose conduct more closely conformed to international law. Third, a meaningful standard would more likely ensure that state conduct in contravention of its elements is properly identified, condemned, and punished.

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11. *See, e.g.*, Hannes Herbert Hofmeister, *Neither the 'Caroline Formula' nor the 'Bush Doctrine'—An Alternative Framework to Assess the Legality of Preemptive Strikes*, 2 U. NEW ENG. L.J. 31, 45–50 (2005) (Austl.) (propounding "an alternative legal framework which could guide the decisions of states on whether to use force in self-defence in the face of a prospective *catastrophic attack*") (emphasis added); Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 771, 797–801 (2003) (advancing a "narrow terrorist exception" to the preemptive self-defense doctrine); Beth M. Polebaum, *National Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 208–12 (1984) ("propos[ing] an international law standard concerning imminency and anticipatory self-defense for a nuclear age").

12. The Bush Doctrine fits this characterization because it justifies the use of preemptive self-defense in the specific counterterrorism and counter-proliferation contexts while couching itself in almost unbounded terms, and thereby provides little concrete guidance as to its operational parameters. The Bush Administration's updated National Security Strategy in 2006 left unelaborated the 2002 approach with respect to the use of force in self-defense. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Mar. 16, 2006, ch. V.C.4, *available at* http://www.iwar.org.uk/military/resources/nss-2006/nss2006.pdf.

Part II of this Article attempts to define the baseline legal standard for this review, a natural and necessary starting point for any legal reform. Part III sets forth a legal policy framework; it is against this backdrop that the current state of the law may be evaluated on its merits and a more suitable standard may be erected in response to fundamental principles and contemporary needs. Part IV briefly reviews key methodological considerations regarding the development of a legal standard, and Part V presents the Author's detailed proposal for reform.

II. DEFINING THE BASELINE LEGAL STANDARD

The task of crafting a new legal standard immediately presents the confounding problem of defining the current law. Although there is no clear international consensus regarding the overall lawfulness of proactive self-defense,[13] there is a discernible pattern of state practice supporting the legality of anticipatory self-defense—albeit under strictly limited circumstances.[14] (The same cannot be said of the more temporally distant preemptive self-defense.[15]) The adoption of this emerging consensus as the *presumed prevailing standard*—for the sake of argument—allows this Article to bring a more robust normative perspective to bear on the issue of proactive self-defense, as it will provide a useful and tangible baseline against which to present a critique, identify specific areas requiring redress, and ultimately shape the reform proposal.

While this conceptual approach may amount to taking liberties with the current state of the law, particularly in light of the literal text of Article 51 of the UN Charter,[16] it actually constitutes no more

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13. GARDAM, *supra* note 9, at 138; Jean Combacau, *The Exception of Self-Defense in U.N. Practice*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE, at 9, 24–25 (Antonio Cassese ed., 1986); Albrecht Randelzhofer, *Article 51*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, at 659, 675 (Bruno Simma et al. eds., 1995).

14. ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 232–33 (1986); T.D. Gill, *The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy*, 11 J. CONFLICT & SEC. L. 361, 366 (2006); Sadoff, *supra* note 4, at 574–75. *But see* TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 151 (2005) (noting insufficient evidence to detect any developing consensus regarding the right of anticipatory self-defense).

15. *High-Level Panel Report*, *supra* note 10, ¶¶ 189–191; STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 165 (1996).

16. Article 51, which resides in Chapter VII, contains the only provision regarding self-defense in the Charter, which itself constitutes the principal conventional law on the use of force and self-defense. For decades, much debate has ensued over the proper interpretation of Article 51, especially in its interplay with customary international law, a parallel body of law. That discussion lies outside the scope of this Article, which, for present purposes, will construe its language as

than a modest stretch, given the noteworthy support anticipatory self-defense has recently garnered.[17] To the extent the assumed standard can be accurately appraised, it appears to closely resemble the restrictive formula set forth with respect to the *Caroline* incident of 1837.[18]

The *Caroline* incident occurred during a period of armed insurrection against British colonial rule in Canada.[19] Although the United States maintained a neutral posture regarding the dispute, a number of American citizens along the U.S.–Canada border provided aid to the Canadian rebels.[20] The *Caroline,* an American-owned steamship, was allegedly being used to transport supplies and reinforcements to support rebels residing on the Canadian side of the

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consistent with the so-called counter-restrictionist view that admits the exercise of self-defense in instances not limited to when a state has *already suffered* an "armed attack." *E.g.*, Matt S. Nydell, *Tensions Between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor*, 24 VA. J. INT'L L. 459, 485–86 (1983). Article 51 reads as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51 (emphasis added).

17. By way of indication, within the last few years, the anticipatory self-defense doctrine has been recognized in effect both by leading U.K. international law scholars who contributed to a set of principles published by the Royal Institute of International Affairs, more commonly known as the Chatham House, see ELIZABETH WILMSHURST, CHATHAM HOUSE, PRINCIPLES OF INTERNATIONAL LAW ON THE USE OF FORCE BY STATES IN SELF-DEFENCE 4 (2005) [hereinafter CHATHAM HOUSE PRINCIPLES] ("The law on self-defence encompasses more than the right to use force in response to an *ongoing* attack."), and by the U.N. Secretary-General, who endorsed and adopted the December 2004 report of his High-Level Panel on Threats, Challenges and Change, *High-Level Panel Report*, *supra* note 10 and then reaffirmed that view in 2005 through his report entitled, The Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 24, *delivered to the General Assembly*, U.N. Doc. A/59/2005 (Mar. 21, 2005), *available at* http://www.un.org/largerfreedom.

18. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 314 (1997); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 136 (1986). Notably, although the International Court of Justice (ICJ) has yet to cite to the *Caroline* formula in any of its judgments or opinions, James A. Green, *Docking the* Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT'L & COMP. L. 429, 447–48 (2006), it must also be acknowledged that the ICJ has yet to be squarely presented with a dispute over a first use of force allegedly taken in self-defense.

19. Green, *supra* note 18, at 433.

20. *Id.*

Niagara River.[21] One night, British soldiers set fire to the *Caroline* while it was docked on the U.S. shore and subsequently let it drift down the Niagara Falls.[22] When the United States protested, the British defended the conduct by claiming to have acted out of "necessity of self-defence and self-preservation."[23]

In April 1841, Secretary of State Webster sent a letter to the British government, articulating a standard for self-defense that required a showing of

> *necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation*. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, *did nothing unreasonable or excessive*; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.[24]

In July 1842, Britain's Lord Ashburton accepted Webster's proposed formulation.[25] Although much debate persists as to the standard's true meaning and application,[26] it is widely treated as a generally accurate statement of anticipatory self-defense.[27] The formula appears, in its barest sense, to stand for three elements—necessity, imminence, and proportionality—required to justify an initial strike in self-defense. Regrettably, neither Webster nor his British interlocutor explicated those elements. Yet, although the terms are not uniformly understood, it is still possible to outline their essential meanings.

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21. *Id.*

22. *Id.*

23. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 42 (1963) (quoting R.Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AM. J. INT'L L. 82, 85 (1938)).

24. *Id.* at 43 (emphasis added).

25. *Id.*

26. Many believe, for example, that the Webster formula reflected a less generous standard than then-prevailing state practice suggested. *E.g.,* Green, *supra* note 18, at 438–40; David B. Rivkin, Jr. et al., *Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 469 (2004). Some have interpreted the standard as strictly limited to use against a non-state actor, because actions by the *Caroline* and its crew were not attributable to the U.S. government. *E.g.*, Green, *supra* note 18, at 443–44. Some question the formula's very relevance for influencing or determining an anticipatory self-defense standard, as: (1) the formula expressed an essentially political agreement, O'BRIEN, *supra* note 10, at 132–33, (2) the formula was developed at a time when the notion of self-defense had a distinctly different meaning than it does today, ROBERT KOLB, SELF-DEFENCE AND PREVENTIVE WAR AT THE BEGINNING OF THE MILLENNIUM 112 (2004), and (3) the threat environment has changed to the point where such a dated formula no longer applies, Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 598 (1963).

27. ALEXANDROV, *supra* note 15, at 19–20; CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 168 (2005); Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, 97 (2003).

Necessity. It must be necessary for a state to resort to force in defending itself against an attack.[28] The use of force must be the "only viable option" remaining to thwart an attack; that is, no feasible lesser alternative can exist.[29] Consistent with this notion, all reasonable measures must have been taken to exhaust any practicable nonmilitary options, such as undertaking diplomacy or imposing economic sanctions.[30]

Imminence. Linked closely to necessity is the concept of imminence, which traditionally requires that a threatened harm be immediate or otherwise temporally proximate.[31] Imminence is perhaps best understood as a subsidiary element of necessity because it presupposes a state of necessity to the extent that no realistic window of opportunity can remain to pursue nonmilitary alternatives.[32] Further, if a state acts too long before a threat manifests, one may question whether it was indeed necessary to exercise self-defensive force under the circumstances.[33]

Proportionality. Proportionality in the present *jus ad bellum* context is not to be confused with either its *jus in bello* counterpart[34] or with equality or symmetry between the quantum, intensity, or means of force used.[35] Rather, proportionality functionally represents the minimum extent of force necessary to meet the objective of self-defense, i.e., to repel the threat faced.[36] In other

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28. DAVID RODIN, WAR AND SELF-DEFENSE 40 (2002).

29. Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 530, 535–36 (2002); Dominika Švarc, *Redefining Imminence: The Use of Force Against Threats and Armed Attacks in the Twenty-First Century*, 13 ILSA J. INT'L & COMP. L. 171, 181 (2006).

30. GAZZINI, *supra* note 14, at 146–47; IRVING J. SLOAN, THE LAW OF SELF-DEFENSE: LEGAL AND ETHICAL PRINCIPLES 46 (1987).

31. GARDAM, *supra* note 9, at 154; Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y 737, 755 (2004).

32. RODIN, *supra* note 28, at 41; Roberts, *supra* note 8, at 277.

33. O'CONNELL, *supra* note 6, at 9; RODIN, *supra* note 28, at 41.

34. Although sometimes treated interchangeably, the concepts of proportionality differ markedly between *jus ad bellum* and *jus in bello*. A disproportionate strike in the *jus in bello* context is based on the following calculation: when the "expected" loss of civilian life and damage to civilian property "would be excessive in relation to the concrete and direct military advantage anticipated." Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 51(5)(b), June 8, 1977, *available at* http://www.unhchr.ch/html/menu3/b/93.htm [hereinafter Additional Protocol I]. Additional Protocol I would apply to *nonparties*, including the United States, insofar as its provisions constitute customary international law.

35. RODIN, *supra* note 28, at 42; CHRISTIAN WICKER, THE CONCEPTS OF PROPORTIONALITY AND STATE CRIMES IN INTERNATIONAL LAW 44–47 (2006); Robert Ago, *Addendum to the Eighth Report on State Responsibility* ¶ 121, [1980] 2 Y.B. Int'l L. Comm'n 69, U.N. Doc. A/CN.4/318/Add.5-7/1982 [hereinafter *Ago Report in 1980 ILC Y.B.*].

36. D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 269 (1958); MCDOUGAL & FELICIANO, *supra* note 7, at 241–43; NAGENDRA SINGH & EDWARD

words, the use of force in self-defense may not be "unreasonable or excessive" in meeting those defensive ends.[37] Thus, if the duration or geographic reach of a "defensive" strike extended unreasonably beyond the point at which the threat was repelled, it would be considered disproportionate.[38]

One leading treatise describes the current standard governing self-defense, taking into account the elements articulated by Webster, as exhibiting the following general conditions:

> (a) an attack is launched, or is immediately threatened, against a state's territory or forces (and probably its nationals); (b) there is an urgent necessity for defensive action against that attack; (c) there is no practicable alternative to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect; (d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement.[39]

It is reasonable to characterize this standard as highly restrictive, affording a defending state very limited legal latitude to strike first in self-defense.

There is no doubt that, whatever else can be said of the current presumed legal standard, it lacks specificity. With that caveat in mind, this Article will nevertheless endeavor to identify the standard's key features. As a starting point, a principal condition would be imminence of an attack.[40] The burden of proof would lie with the defending state to prove that force was justifiable under the circumstances.[41] The state would have to provide "sound" evidence "capable of objective assessment"[42] in order to convince the international community that the attack was "certain" or virtually certain.[43]

In addition, the "defending" state should be able to prove that, before engaging in hostilities, it attempted to resolve the conflict

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MCWHINNEY, NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW 100 (1989); Gill, *supra* note 14, at 366.

37. This quoted language derives from the *Caroline* standard discussed at *supra* Part II. *See also* DINSTEIN, *supra* note 5, at 210 (defining proportionality as a "standard of reasonableness in the response to force by counter-force"); WICKER, *supra* note 35, at 39 (defining proportionality as the use of force be necessary to defend oneself without being excessive).

38. GARDAM, *supra* note 9, at 179–80; SLOAN, *supra* note 30, at 47.

39. SIR ROBERT JENNINGS & SIR ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW 422 (9th ed. 1992).

40. CASSESE, *supra* note 14, at 233; D.W. GRIEG, INTERNATIONAL LAW 680–81 (1970); Gill, *supra* note 14, at 366.

41. BROWNLIE, *supra* note 23, at 214.

42. CHATHAM HOUSE PRINCIPLES, *supra* note 17, at 8–9. *But see* O'CONNELL, *supra* note 6, at 9 (applying "clear and convincing" evidence test in cases where an "enemy is preparing to attack again").

43. O'CONNELL, *supra* note 6, at 8; *see also* BROWNLIE, *supra* note 23, at 259.

through all "reasonably peaceful means" available.[44] States must be able to demonstrate that the force used was strictly limited to repelling the threat posed and was not driven by offensive, retaliatory, or other unlawful purposes.[45] Additionally, a defending state must comply with any applicable international laws and obligations, including—most conspicuously—the rules of international humanitarian law (IHL).[46] Although the standard of review is not currently well defined, states by and large must presumably satisfy all three central elements of imminence, necessity, and proportionality under a "reasonable nation" standard.[47] The specific or general factors relevant to an evaluation under that standard remain unclear, but the review would appear to be based on an *ex ante* (versus *ex post*) perspective.[48]

III. CRITERIA FOR FRAMING THE PROPOSED LEGAL STANDARD

The objective of this Part is to develop an analytical model that identifies and describes the criteria pertinent both to a critique of the presumptive legal standard governing proactive self-defense and to the development of a more functional and meaningful standard. The criteria are organized into four major components reflecting the standard's priority features—namely, it must (1) possess certain basic attributes and (2) address current security realities, while (3)

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44. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 72 (1993).

45. JENNINGS & WATTS, *supra* note 39, at 412.

46. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 42 (July 8) [hereinafter Nuclear Weapons Opinion]; Louis René Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law*, 26 VAND. J. TRANSNAT'L L. 111, 115 n.11, 147–48 (1993); Sienho Yee, *The Potential Impact of the Possible U.S. Responses to the 9-11 Atrocities on the Law Regarding the Use of Force and Self-Defence*, 1 CHINESE J. INT'L L. 287, 293 (2002).

47. *See* McDougal, *supra* note 26, at 597–98.

> In broadest formulation, this right of self-defense, as established by traditional practice, authorizes a state which being the target of activities by another state, *reasonably decides, as third-party observers may determine reasonableness*, that such activities imminently require it to employ the military instrument to protect its territorial integrity and political independence, to use such force as may be necessary and proportionate for securing its defense.

Id. (emphasis added).

48. Most commentators appear to prefer the *ex ante* viewpoint, see *infra* note 236, but at least one scholar has questioned the legality of Israel's anticipatory strike in the Six-Day War based on post mortem evidence demonstrating that Egypt and Syria, contrary to expectations, were in fact not about to launch an attack on Israel. O'CONNELL, *supra* note 6, at 9.

ensuring the legitimacy of international law and (4) diminishing the prospects of armed conflict.

A. *First Component: Possess Certain Basic Attributes*

The fundamental attributes of the ideal legal standard are: clarity, flexibility, comprehensiveness, and objectivity. Each will be examined in turn.

1. Clarity

It should be axiomatic that the international community demands and expects a reasonably clear set of rules governing proactive self-defense. After all, states need to know under what specific circumstances they may employ force before suffering an attack, as well as when others may use proactive defensive force against them. The rules must also be clear enough that states are able to implement them without confusion or undue delay. Legal guidance that is murky or abstract could lead to a heightened risk of armed conflict arising from innocent or even feigned misunderstanding.[49] Uncertainty could also complicate legal accountability, as violations would be harder to discern. As Henkin aptly observed:

> In our decentralized international political system with primitive institutions and underdeveloped law enforcement machinery, it is important that Charter norms—which go to the heart of international order and implicate war and peace in the nuclear age—be *clear, sharp* . . . .[50]

Given the cloudy context of anticipatory self-defense today, many have clamored for a clearer legal standard.[51] Indeed, the present lack

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49. John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 354–55 (2003). *See generally* Michael Skopets, Comment, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753, 767 n.69 (2005) ("Because international self-defense laws were not codified, principles governing self-defense could be, and were, interpreted differently by various countries and in divergent traditions.").

50. O'CONNELL, *supra* note 6, at 16 (emphasis added).

51. *See, e.g.*, BROWNLIE, *supra* note 23, at 260 ("The particular fault of the customary rule is that it provides no clear guidance as to the very rare cases in which anticipatory acts of force may be justified: even the formula in the *Caroline* case is primarily verbal."); Timothy L.H. McCormack, *Anticipatory Self-Defence in the Legislative History of the United Nations Charter*, 25 ISR. L. REV. 1, 42 (1991) ("The efforts of international lawyers now ought to concentrate on clarifying the limits of anticipatory self-defence . . . ."); Terence Taylor, *The End of Imminence?*, WASH. Q., Autumn 2004, at 57, 60 ("Because of the nature of current and pending international security threats, more precision is urgently needed to establish a common understanding of legally justifiable action in the face of imminent threats . . . .").

of clarity is perhaps the greatest defect of the current standard and provides the major impetus for reform. Uncertainties exist across virtually all dimensions of the legal standard, ranging from the question of imminence (e.g., can temporal proximity be imputed from a series of "pin-prick" attacks?); to proportionality (e.g., can this principle accommodate repelling not just the immediate threat, but the overall threat, posed by a given adversary?); to the gravity of the threat (e.g., how serious must a threat be before a state can legitimately resort to preemptive force?); and to the standard of review itself.

Two caveats are in order. First, clarification can backfire and effectively strip states of their rights if the scope of permissible conduct is defined too narrowly or, conversely, increase the prospects of armed conflict if the operative standard is defined too broadly. Indeed, in response to that specific concern, many states, especially those with greater capabilities, have historically demonstrated a distinct preference for keeping the standard sufficiently ambiguous.[52] Second, some scholars contend that a clearer standard would only lead to bickering among states over its precise meaning, so that any added clarity would inconsequentially shift the debate from one source of dispute to another.[53] However, at a minimum, the provisions would impose important outer bounds to be observed, and, when complemented by a reasonableness test, good faith expectations, and international scrutiny, states should be less prone to take impermissible liberties.

2. Flexibility

Clarity must not, however, be accompanied by rigidity.[54] It is well understood that, in the area of military force and self-defense, a healthy degree of operational latitude is required.[55] Any number of threat postures (e.g., based on the character, timing, and gravity of force) may present themselves, including emergent postures based on new means and methods of warfare. Such threats are further

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52. Antonio Cassese, *Return to Westphalia? Considerations on the Gradual Erosion of the Charter System*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE, *supra* note 13, at 505, 520; Skopets, *supra* note 49, at 768.

53. *See* Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. PUB. L. & POL'Y 539, 558 (2001) ("No advance in the art of legal drafting can bridge the enormous gulf that divides the international community over what constitutes acceptable use of force. Any linguistic formula that purported to do so would necessarily consist of a chain of endlessly contested weasel words.").

54. Jane E. Stromseth, *New Paradigms for the* Jus Ad Bellum*?*, 38 GEO. WASH. INT'L L. REV. 561, 572 (2006).

55. Indeed, flexibility is a hallmark of proportionality. DINSTEIN, *supra* note 5, at 210; WICKER, *supra* note 35, at 66–67.

refracted by the perceptual difficulties that almost invariably arise during periods of mounting tension. Accordingly, the legal standard governing proactive self-defense must establish guiding principles that are functional and utilitarian without being too concrete, constraining, or category-bound.[56] At the same time, flexibility should not be confused with "open-endedness," which can create problems of its own.[57] The current standard, for all its looseness in definition, is perceived by many as still lacking sufficient elasticity, especially with respect to the element of imminence.[58]

3. Comprehensiveness

The optimal legal framework should consist of a single, overarching standard that satisfies three related objectives. It should: (1) effectively guide the conduct of all states—small and large, weak and powerful, irresponsible and honorable;[59] (2) accommodate every conceivable type of armed threat scenario;[60] and (3) not only address the substantive elements, but also supply a standard of proof, procedural safeguards, and a standard of review. If a single standard can cover all of these dimensions (with proper clarity and adequate flexibility), it can facilitate states' implementation of proactive self-defense, thereby minimizing the risk of error, misunderstanding, or abuse—as there would be only one standard to apply, as opposed to several. A single, all-encompassing standard can also improve accountability for unlawful conduct. For these reasons,

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56. *See* Gill, *supra* note 14, at 368 (exhorting against applying the *Caroline* factors "as a static checklist or verbal straitjacket"); John Lawrence Hargrove, *The* Nicaragua *Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 143 (1987) (advocating against a highly technical standard that reads like a tax code); Amos Shapira, *The Six-Day War and the Right of Self-Defence*, 6 ISR. L. REV. 65, 75 (1971) (noting that the subject matter "does not lend itself to rigid formulae").

57. *See* Andrew Garwood-Gowers, *Self-Defence Against Terrorism in the Post-9/11 World*, 4 QUEENSLAND U. L. & JUST. J. 1, 15–17 (2004) (stating that open-endedness can lead to military action well beyond meeting the specific need to repel a threatened attack); Nabati, *supra* note 11, at 793 (observing that "open-endedness" can eschew multilateralism and increase the likelihood of war).

58. *E.g.*, U.K. PARLIAMENT SELECT COMM. ON FOREIGN AFFAIRS, WRITTEN EVIDENCE OF PHILIPPE SANDS: "INTERNATIONAL LAW AND THE USE OF FORCE" ¶ 15 (July 30, 2005) [hereinafter SANDS EVIDENCE], *available at* http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060805.htm; Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV. J. INT'L L. & POL'Y 150, 177 (2004); Polebaum, *supra* note 11, at 208.

59. Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 274 (1989); Švarc, *supra* note 29, at 189.

60. Illustrative examples include: (1) cross-border incursions, (2) naval blockades, (3) computer attacks with severe kinetic effects, (4) a series of "pin-prick" strikes, and (5) assaults where a state's survival would be at stake.

comprehensiveness has been acknowledged as a critical variable for a legal standard.[61] It is of great import, however, that this attribute not be pursued with Procrustean zeal, such that exceptional circumstances are arbitrarily forced into a one-size-fits-all standard.

4. Objectivity

The initial decision whether to exercise force in self-defense in a crisis situation must be left, by necessity, to the state under threat;[62] there is simply no practical alternative, as the Security Council is not well suited to respond with the alacrity required in an emergency.[63] It is nevertheless critical that states not be given unfettered discretion and that determinations are ultimately subject to an *ex post facto* review for their lawfulness by the international community.[64] The problem lies in how to incorporate objectivity into the decision-making calculus, both for the defending state making the initial determination and for the international community when it conducts its review. Objectivity is desirable because it mitigates purely instinctual, irrational, or politically self-serving reactions by imposing a measured set of criteria that satisfy general societal expectations. Although it is difficult to imagine a more objective (i.e., verifiable) standard than that of *reactive* self-defense,[65] for the reasons identified below, such a position is largely untenable in today's world.

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61. O'CONNELL, *supra* note 6, at 16 (quoting Henkin).

62. PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 164 (1948); MALCOLM N. SHAW, INTERNATIONAL LAW 790 (4th ed. 1997).

63. The Charter drafters proved prescient by providing for states to exercise their inherent right to self-defense "*until* the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51 (emphasis added).

64. J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 296 (4th ed. 1949); *see also* International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *as reported in* 41 AM. J. INT'L L. 172, 207 (1947) [hereinafter IMT/Nuremberg] (applying this doctrine to the case of the German invasion of Norway in 1940).

65. Consistent with this view, some favor a legal regime that proscribes, in principle, any proactive defensive force but would allow an offending state to make its case to the international community, and, to the extent mitigating circumstances were found, an appropriately diminished penalty would be exacted. *E.g.*, ANTONIO CASSESE, INTERNATIONAL LAW 362 (2d ed. 2005). *But see* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1983).

> [W]e must recognize that there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation. It does not seem to me that the law should leave such defense to a decision *contra legem* [i.e., against the law].

Id.

B. *Second Component: Address Current Security Realities*

Any meaningful legal standard applicable to the use of force must account for the military and political realities of the day. As Cassese has observed: "International law is a realistic legal system. It takes account of existing power relationships and endeavors to translate them into legal rules."[66] The three "realities" that the governing legal standard must address, at a minimum, are: (1) the nature and destructive capacity of modern weaponry; (2) the reduced time to react to attacks capable of accelerated methods of delivery;[67] and (3) the proven inability of the Security Council to intervene timely and effectively to avert impending attacks.[68]

1. Nature and Destructive Capacity of Modern Weaponry

Although technological advances in weaponry, whether in terms of precision, destructive yield, or character (e.g., "dirty bombs"), have occurred over the past several decades, the weapons most pertinent to this inquiry are the so-called weapons of mass destruction (WMD), which include nuclear, biological, chemical, and radioactive weapons.[69] The destructive capacity of these weapons, as soberly witnessed in such locations as Hiroshima[70] and Halabja,[71] is almost

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66. CASSESE, *supra* note 14, at 26; *see also* Hofmeister, *supra* note 11, at 33–38 (commenting that *jus ad bellum* is "not a static concept"; it has evolved significantly over the centuries).

67. *See* Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO. INT'L L.J. 7, 16 (2003) (noting that the gravity of the threat and the method of delivery of the threat are two non-*Caroline* factors relevant to determining whether an attack is imminent). Admittedly, these "realities" do not apply uniformly to all states; they are most germane to the militarily advanced states. Accordingly, any proposal to reform the legal standard must accommodate these realities while remaining mindful of the inequality in circumstances across the international community.

68. A fourth "reality" is often referenced in this context but, because it fundamentally concerns *non-state* actors, will not be discussed here. That "reality" is the changing character of the "enemy," namely, the emergence of global terrorism. *See, e.g.*, Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WEEKLY STANDARD, Jan. 28, 2002, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/000/810hjeup.asp?pg=2 ("[T]errorist organizations 'of global reach' were unknown when Article 51 was drafted."); Hofmeister, *supra* note 11, at 42 (discussing views on self-defense as it relates to new threats posed by terrorism).

69. Jack Boureston, *Assessing Al Qaeda's WMD Capabilities*, STRATEGIC INSIGHTS, Sept. 2002, http://www.ccc.nps.navy.mil/si/sept02/wmd.asp.

70. The atomic bomb that exploded over Hiroshima had a relatively low-yield of 13 kilotons (equivalent to 13,000 tons of TNT) but nevertheless resulted in the immediate deaths of 70,000-130,000 persons. The Atomic Museum, http://www.atomicmuseum.com/tour/dd2.cfm (last visited Feb. 20, 2009). To put this size into perspective, the Russian SS-18 missile can carry a single warhead with a capacity of 20 megatons (or the equivalent of 20 *million* tons of TNT). Defencejournal.com, Evolution

unimaginably enormous and instantaneous, operating on a level that the Charter drafters could not have reasonably foreseen.[72] In addition, such weapons have steadily become more widely available.[73] Concern about the proliferation of WMD and related technologies has arisen due to, inter alia, the dispersal of the former Soviet Union's extensive nuclear arsenal beginning in 1989,[74] the emergence of a WMD marketplace[75] with dedicated "buyers" (e.g., "rogue states") and "sellers" (e.g., the A.Q. Khan network[76]), and the dual-use nature of these weapons.[77]

Such significant changes in modern weaponry render the security, if not the survival, of states increasingly vulnerable, as the detonation of a single nuclear bomb or introduction of a chemical agent into a municipal water system could wipe out an entire city population and wreak untold economic and societal damage.[78] As Greenwood argues:

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of Nuclear Doctrine and the Effects on Conventional Force Structure, http://defencejournal.com/apr99/evolution-nuclear.htm (last visited Feb. 20, 2009).

71. Halabja is the Kurdish village in northern Iraq that suffered a chemical weapons attack in March 1988 on the order of President Saddam Hussein, resulting in the immediate deaths of at least 5,000 Kurds (and up to 12,000 altogether over a period of days). Alex Atroushi, *Kurdistan Democratic Party, Bloody Friday: Chemical Massacre of the Kurds by the Iraqi Regime, Halabja—March 1988*, http://www.kdp.pp.se/old/chemical.html (last visited Feb. 20, 2009).

72. AREND & BECK, *supra* note 44, at 38; Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self-Defense*, 72 U. MO. KAN. CITY L. REV. 123, 159–60 (2003); Mark L. Rockefeller, *The "Imminent Threat" Requirement for the Use of Preemptive Military Force: Is It Time for a Non-Temporal Standard?*, 33 DENV. J. INT'L L. & POL'Y 131, 135 (2004).

73. *See* Roberts, *supra* note 8, at 244–45, 253–54 (discussing the resurgence of terrorism in modern times and an increase in its severity, frequency, and technology and noting that money, sanctuary, weapons and munitions, intelligence, training, and technical expertise, are much more readily available to terrorist groups, especially to state-sponsored terrorist groups).

74. *See* Hofmeister, *supra* note 11, at 47, 47 n.66 (referencing financial incentives and questionable security in connection with the vast Soviet nuclear weapons inventory).

75. *Id.* at 47.

76. *See* GEORGE TENET WITH BILL HARLOW, AT THE CENTER OF THE STORM xvii, 261 (2007) (noting that A.Q. Khan, the father of Pakistan's nuclear program, "built an international network of suppliers of nuclear capability for sale to rogue states").

77. Dual-use weapons have both commercial (e.g., energy, medical) and military applications. Their duality complicates detection efforts.

78. It is precisely for this reason that some legal commentators argue for further constraints. They contend that broader state discretion to mount a defensive strike might result in conflicts that otherwise never would have occurred, and that the high stakes involved therefore counsel for a more cautionary stance. *E.g.*, HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 94 (1992); Bert V.A. Röling, *The Ban on the Use of Force and the U.N. Charter*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE, *supra* note 13, at 3, 6–7; Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense Under International Law*, 12 TUL. J. INT'L & COMP. L. 117, 140–41 (2004).

The potentially cataclysmic dimensions of an attack with nuclear, biological or chemical weapons makes the threat so disproportionate to conventional threats that existed in the times of the Caroline case that it would be suicidal to wait until an attack is visibly underway.[79] Furthermore, such weapons could target and efficiently destroy a state's military infrastructure and assets (especially if concentrated among a small number of bases), leaving that state unable to mount an effective defense.[80]

2. Reduced Time to Respond to Attacks.

The presumed legal standard governing proactive self-defense dictates that a state may not use force unless the threatened attack is imminent. This concept assumes that a "time-gap" exists between the threat posed and the actual attack, during which—if the span is short enough—a state would be entitled (at least under this single-factor analysis) to launch a proactive defensive strike.[81] This assumes that states have the luxury of knowledge of an impending attack. It is contended, however, that this assumption is no longer realistic,[82] particularly in light of technological advances that have enabled weapons, such as ballistic missiles and stealth bombers, to travel with remarkable speed and secrecy,[83] coupled with an increased priority assigned by many to the element of surprise.[84] To the extent that the time-gap has vanished for certain types of threats, states would have no genuine opportunity to satisfy the imminence

79. Švarc, *supra* note 29, at 183; *see also* Glennon, *supra* note 68 (noting that with WMD, the "first blow can be devastating—far more devastating than the pinprick attacks on which the old rules . . . were premised").

80. Martinez, *supra* note 72, at 159–60.

81. *See* Rockefeller, *supra* note 72, at 139 (using the term "time-gap").

82. William C. Bradford, *"The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1390 (2003); Louis J. Capezzuto, Note, *Preemptive Strikes Against Nuclear Terrorists and Their Sponsors: A Reasonable Solution*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 375, 392 (1993). In addition, certain weapons systems complicate the imminence analysis not on account of their speed and the clandestine quality of their delivery, but instead due to unique characteristics. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 108 nn.48–49 (2d ed. 2004) (citing the difficulty of fitting naval mines and radar-guided missiles into traditional conceptions of self-defense).

83. Capezzuto, *supra* note 82, at 392; Vytautas Kacerauskis, *Can A Member of the United Nations Unilaterally Decide to Use Preemptive Force Against Another State Without Violating the UN Charter?*, 2 INT'L J. BALTIC L. 73, 89 (2005). The increased speed of these weapons has not compromised their accuracy, given the advent of sensors and precision-guided systems. Rockefeller, *supra* note 72, at 136.

84. Greenwood, *supra* note 67, at 16; Rockefeller, *supra* note 72, at 140.

element, effectively leaving them and their populations helpless in the face of attack.[85]

3. Proven Inability of Security Council to Timely Intervene

Ideally, a legal standard governing proactive self-defense would promote an effective multilateral approach for resolving inter-state disputes. As strategist Guoliang put it: "[I]nternational cooperation . . . is the key to international security."[86] A concern expressed about granting expanded authority for states to use force in self-defense is that it would instead foster unilateralism at the expense of collective security and in contravention of the Charter regime.[87] The reality, however, is that the Security Council has not adequately delivered on its promise to provide "prompt and effective"[88] collective security against aggressor states.[89] This result is a product of several interrelated factors, including the failure of states themselves to enter into the special agreements that would have given rise to an armed force at the Security Council's disposal (per Article 43 of the Charter), extensive use of the veto power by the permanent members, paralyzing political and ideological divisions,[90] and a loss of confidence, especially among Western states, in the effectiveness of a politicized United Nations to broker a dispute dispassionately.[91] In effect, the bargain struck under the Charter has been one-sided, with states conceding their right to use force under Article 2(4)[92]—in all but highly restricted circumstances, and then

85. SANDS EVIDENCE, *supra* note 58, para. 15. *See generally* Louis René Beres, *After the SCUD Attacks: Israel, 'Palestine,' and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71, 103 (1992) ("International law is not a suicide pact.").

86. Harry S. Laver, *Preemption and the Evolution of America's Strategic Defense*, PARAMETERS, Summer 2005, at 107, 116–17, *available at* http://www.carlisle.army.mil/usawc/Parameters/05summer/laver.htm.

87. Eckert & Mofidi, *supra* note 78, at 150; Greenwood, *supra* note 67, at 10; *see also High-Level Panel Report*, *supra* note 10, ¶¶ 104–106 (describing a preference for good communication and preventative deployment of peacekeepers during times of mounting tensions); Švarc, *supra* note 29, at 177 (describing the regime as one favoring collective security in place of unilateral military actions).

88. This is the standard of action expected of the Security Council in executing its "primary responsibility for the maintenance of international peace and security." U.N. Charter art. 24, ¶ 1.

89. WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 259 (1964); Pierson, *supra* note 58, at 177; Brunson MacChesney, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592, 596 (1963).

90. Devika Hovell, *Chinks in the Armour: International Law, Terrorism and the Use of Force*, 27 U. N.S.W. L.J. 398, 402 (2004). Indeed, even with the Cold War behind us, fundamental political rifts within the Security Council remain, and it is certainly conceivable that the Security Council will once again be plagued by either a set of dueling superpowers or by the opposite problem, intransigent multi-polarity.

91. AREND & BECK, *supra* note 44, at 39.

92. *See* U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or

only on a provisional basis per Article 51—in exchange for an ineffective collective security machinery.[93] A state's discretion to engage in proactive self-defense can help compensate for this imbalance.[94]

C. *Third Component: Ensure Legitimacy of International Law*

Not only must the ideal standard take account of changing realities in the international security environment, but it must also embrace requirements perceived as legally feasible or else risk a loss

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political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

93. Admittedly, the General Assembly is authorized to step in for the Security Council in moments of such deadlock and inaction. In 1950, during the throes of the Cold War, the General Assembly passed the Uniting for Peace Resolution, No. 377 (V) (1950), which allowed it to "recommend collective measures, including the use of armed force if necessary." GRAY, *supra* note 82, at 200. The ICJ validated this authority as consistent with the General Assembly's powers under the Charter. Certain Expenses of the United Nations (Art. 17, para. 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 243 (July 20). For several reasons, however, this authority offers no panacea to the problem of Security Council inaction. First, the General Assembly, which must contend with its own ideological factions, requires a supermajority of two-thirds to pass a resolution for maintenance of international peace and security, which is no mean feat. U.N. Charter art. 18, ¶ 2. Second, in such matters, the General Assembly is not authorized to pass *binding* resolutions; thus, it may not enforce compliance by Member States with its international peace and security-related *recommendations*. *See* Certain Expenses, 1962 I.C.J. at 163, 296 (noting that the role of the General Assembly is limited to "discussions, petitions, recommendations, and actions of limited scope" and it is the Security Council that has the actual power to resort to force in order to restore order). Although the General Assembly could recommend the use of force to an individual state willing and able to launch a proactive defensive strike, it would be far more likely, given the time it would take to consult and obtain direction from such an unwieldy body, that any such recommendation would come only after that state had suffered a blow. Third, the General Assembly has shown little proclivity in recent decades to exercise this power (which was last exercised during the Congo crisis in the 1960s). *See* DINSTEIN, *supra* note 5, at 316–17 ("[I]n recent years [the General Assembly] appears to have largely reconciled itself to taking a secondary or silent role.") (internal quotations omitted).

94. Combacau, *supra* note 13, at 32; McDougal, *supra* note 26, at 597–98; Van den hole, *supra* note 23, at 105–06. One commentator advises that Article 51 and Chapter VII on collective security should operate "correlative[ly]": "The weaker the Chapter VII collective security system . . . the more liberally we should grant the rights of individual and collective self-defense to nations because the international police force is not working." Richard N. Gardner, *Commentary on the Law of Self-Defense*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 49, 53 (Lori Fisler Damrosch & David J. Scheffer eds., 1991). Some would prefer to strengthen the UN system itself rather than to enlarge self-defense rights. That approach, while commendable in principle, fails to address the fundamentally altered reality that today's weapons and their delivery capacity have significantly collapsed the time period in which a state may well need to respond with force. Even under a more efficient and streamlined mechanism, the window of opportunity for consultation and action, whether by the Security Council or the General Assembly, simply would not be sufficient under many inter-state conflict scenarios.

of legitimacy. The standard must be realistic so that it can be effectively implemented and enforced; otherwise, it could become irrelevant.[95] This section is divided into three parts: (1) how behavioral realism contributes to legal legitimacy; (2) an evaluation of the extent to which the presumptive legal standard for proactive self-defense reflects state behavior; and (3) the legitimacy concerns that may arise from a legal standard that is too accommodating to states' natural inclinations.

1. Behavioral Realism in Law Contributes to Its Legitimacy.

"Laws must bear some relation to practice or they cannot regulate conduct effectively. Laws that impose unrealistic standards are likely to be violated and ultimately forgotten."[96] This proposition applies to the UN Charter[97] as well as (perhaps ironically) to customary rules regulating the use of defensive force.[98] The law "must permit reasonable responses to those threats [to a nation's security] in light of the often difficult circumstances in which decision-makers make tough choices."[99] Otherwise, the law could become perceived as illegitimate, being so widely flouted as to cause the standard itself to fall into desuetude.[100]

More concretely, when a perceived need has arisen, states have demonstrated an unwillingness to accept at face value certain

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95. The maintenance of world peace and security depends importantly on there being a common global understanding, *and acceptance*, of when the application of force is both legal and legitimate. One of these elements being satisfied without the other will always weaken the international legal order . . . .

High-Level Panel Report, *supra* note 10, ¶ 184 (emphasis added); *see also* GRIEG, *supra* note 40, at 680 ("Unless a rule of international law is based upon the practice of states or is sufficiently general to fit in with both that practice and the reasonable demands of states likely to be faced with the need to act, it is probable that it will not be observed.").

96. Cohan, *supra* note 49, at 354.

97. *See* Michael C. Bonafede, Note, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks*, 88 CORNELL L. REV. 155, 190 (2002) (stating that applying Article 51 is often much more difficult when addressing international terrorism rather than the traditional hostile state actor envisioned by the U.N. Charter and calling for redesign of international legal norms regarding proportional response applying to international terrorist threats). To its credit, the Charter has proven remarkably agile in responding to challenges and circumstances not foreseen by its drafters. Stromseth, *supra* note 54, at 566.

98. Hargrove, *supra* note 56, at 139; John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 749–50 (2004).

99. Stromseth, *supra* note 54, at 567.

100. Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 942 (2005) (maintaining that desuetude applies to international law and occurs when "a sufficient number of states join in breaching a rule, causing a new custom to emerge").

apparent restrictions on their right to use force, such as when they have undertaken armed interventions to protect nationals and rescue hostages overseas.[101] Such conduct might reflect a diminution in Article 2(4)'s legitimacy. Further, absent a manifestly lawful basis on which to justify their use of force, states have been known to rely upon practices undertaken by others, particularly powerful states, even if those precedents are mired in controversy.[102]

2. Evaluating the Current Standard for its Consonance with Legal Realism

Although state behavior with respect to proactive self-defense is far from consistent, the presumed prevailing standard, which is highly restrictive, is arguably out of sync with the way states actually reason and behave when faced with imminent threats to their security. A few examples are illustrative. In 1981, Israeli policy makers risked international condemnation in order to destroy the Iraqi Osirak nuclear reactor they suspected was being used to build a nuclear explosive.[103] Likewise, in 1962, although the United States relied on Article 52 to justify its naval quarantine around Cuba, President Kennedy had made clear that the United States "reserved to itself the ultimate right to take the measures necessary for

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101. Notable examples include: (1) El Salvador's invasion of Honduras on a claim that its nationals were being persecuted in Honduras (July 1969); (2) the U.S. attack on Cambodia in connection with the *Mayaguez* incident (May 1975); and (3) the Israeli rescue mission of its nationals at the Entebbe Airport in Uganda (June 1976). A. MARK WEISBURD, THE USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II 269–70, 274–75, 286–87 (1997).

102. For example,

> South Africa justified its actions [in attacking ANC bases in neighboring Botswana, Zambia, and Zimbabwe in May 1986] by reference to the position taken by Western countries against international terrorism. Citing in particular the U.S. attack on Libya [the 14 April 1986 air strikes on installations in Tripoli and Benghazi, Libya], it argued it was entitled to "fight international terrorism in precisely the same way as other Western countries . . . ."

Edward Kwakwa, *Incident: South Africa's May 1986 Military Incursions into Neighboring African States*, 12 YALE J. INT'L L. 421, 427 (1987). In addition, in May 2003, when the Indonesian Government launched a military offensive against separatist rebels in Aceh Province, Indonesian officials "made little secret of their belief that in the aftermath of the war in Iraq, the United States, as well as other countries, would be less critical than in the past of the decision to resort to military force." Jane Perlez, *Indonesia Says it Will Press Attacks on Separatists in Sumatra*, N.Y. TIMES, May 23, 2003, at A11.

103. *See* Skopets, *supra* note 49, at 771 (defending his government's strike on the Osirak reactor in 1981, the Israeli Ambassador stated: "To assert the applicability of the *Caroline* principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State's inherent and natural right of self-defence.").

national self-preservation."[104] More recently, the "Bush Doctrine" exemplifies a growing interest in a more expansive view of the range of available responses to address security threats, while states such as Australia, South Africa, Indonesia, and the United Kingdom, which have exercised the use of force against non-state actors[105] in instances of non-concrete threats, may be similarly inclined vis-à-vis rogue states.[106]

3. Problems with Rules that are Too Accommodating to Legal Realism

It would be simplistic, however, to suggest that a legal standard should be wholly consonant with actual state behavior. Indeed, questions of legal legitimacy may arise if a legal standard is too closely aligned with reality (at least to the extent that it is tantamount to states' natural predilections) such that states might have broad discretion to act with impunity. In such a case, the standard could "erode the whole notion of prohibition on the use of force"[107] under Article 2(4) and thereby undermine the legitimacy of the Charter and, because that instrument underlies the contemporary international legal fabric, the global rule of law itself.[108] Furthermore, if the legal standard merely served as a tool for the most powerful states—or otherwise failed to provide meaningful restrictions on state conduct—the very purpose of having a standard would hardly be realized.

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104. FRIEDMANN, *supra* note 89, at 260.

105. *See* KOLB, *supra* note 26, at 130–31 ("The pre-emptive [self-defense] doctrine has in effect already been claimed by such States as Israel, India, Australia and others, such as Russia and China, albeit in more veiled terms."); *supra* note 102. *See generally* Louis Henkin, *Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 142–43 (Louis Henkin et al. eds., 1989) (discussing the historical tendency of the United States to liberally construe the Charter's language to allow military intervention it deems in the national interest).

106. Nor does one prescribe rules for the nation threatened with [an all-out] attack. If a nation is satisfied that another is about to obliterate it, it will not wait. But it will have to make that decision on its own awesome responsibility. Anticipation in that case may have to be practiced; it need not be preached. The Charter need not make a principle of it; the law need not authorize or encourage it.

Louis Henkin, *Force, Intervention, and Neutrality in Contemporary International Law, in* INTERNATIONAL LAW: THE STRATEGY OF WORLD ORDER 335, 339 (Richard A. Falk & Saul H. Mendlovitz eds., 1966).

107. Eckert & Mofidi, *supra* note 78, at 140.

108. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 98 (2002).

D. *Fourth Component: Diminish Prospects of Armed Conflict*

Finally, the ideal legal standard governing proactive self-defense should minimize the chance that tension will devolve into war. The issue can constructively be posed as follows: Would inter-state armed conflict be less likely to occur under a more restrictive or a more expansive reading of the *Caroline* formula? Three assessment vectors—theoretical, empirical, and potential—guide an exploration of this question.

1. Theoretical Assessment[109]

Based on two leading theories of why states go to war, it is hypothesized that proactive defensive strikes ought to occur with some frequency. One of these, labeled the "spiral theory," holds that as tensions mount between two states, each will tend to spin worst-case assumptions, exaggerating the extent of the enemy's hostility until the perceived immediate threat of an attack by one will eventually spur the other to strike first.[110] The second theory maintains that war is more likely to occur when the offensive state is believed to have an advantage over the defensive state.[111] A proactive strike, if properly executed, could effectively destroy at least some of the opponent's offensive or defensive forces, giving the state that undertakes the initial strike at least an initial boost in a given conflict.[112]

According to the Correlates of War (COW) Project cited by Reiter, however, these hypotheses offer little predictive value.[113] That Project examined all military conflicts from 1816 to 1980[114] between recognized states involving at least 1,000 combatant casualties,[115] and defined a strike as "preemptive" if a belief by the

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109. The principal source for this section is Dan Reiter, *Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen*, 20 INT'L SEC. 5 (1995).

110. *Id.* at 8.

111. *Id.* at 8–9.

112. *See id.* at 10 ("A vulnerable military force is one that cannot wait, especially if it faces an enemy force that is vulnerable if the enemy waits.").

113. *Id.* at 13.

114. Notably, the majority of the time period considered by this study occurred prior to Charter ratification, when international law had not yet generally prohibited resort to force. Although some may believe that for this reason the study yields less meaningful results, the fact remains that states operated under a *lower* legal threshold regarding the use of force before October 1945 and therefore would have been *more* inclined to exercise proactive self-defense.

115. Some might challenge the limited scope of this study, as it omits a host of armed conflicts falling short of "war" and others may question the study's very definition of "war," as there certainly are armed conflicts which reasonable people would agree possess all the trappings of a bona fide war but for the fact that they do

preemptor that it would suffer an attack within sixty days was a primary motivation.[116] Remarkably, the Project found only three instances out of sixty-seven total incidents (4.5%) to be preemptive: the Russo-German interactions in July 1914 (WWI), the Chinese intervention in the Korean War (in 1950), and the Israeli attack on Egypt in 1967 (Six-Day War).[117] In sum, the Project found that proactive defensive measures were not a common catalyst in inter-state conflicts.[118] This conclusion suggests that granting states additional latitude in determining to use self-defensive force against a perceived imminent threat would not necessarily lead to more warfare.

2. Empirical Assessment

The analysis now turns to an examination of historical data, not from the perspective of political science theories of war but from an empirical evaluation of states' tendency to abide by or abuse legal limits. Some commentators point out that, absent an effective enforcement apparatus for state violations of international law, states have shown a willingness to pursue self-interested purposes on pretextual self-defense grounds when the opportunity arises.[119] They cite, for example, the 1948 Pakistani incursion into Kashmir, the 1956 Suez Crisis, and Hitler's attack on the Soviet Union during World War II (Operation Barbarosa).[120] Perhaps surprisingly, however, there is a more compelling empirical case for states choosing *not* to behave proactively.[121]

While one might surmise that it is primarily smaller or weaker states that exercise such self-restraint, as a function of a perceived power imbalance or unacceptable military risk, even stronger states have demonstrated such forbearance. The United States and Israel, among others, have been willing to forego or postpone hostilities because of perceived political benefits or costs,[122] whether a function of seeking political credibility and stature (domestically or

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not meet the requisite number of casualties (e.g., the Falkland Islands or Islas Malvinas "War").

116. Reiter, *supra* note 109, at 13.

117. *Id.* at 13–14.

118. *Id.* at 13, 25.

119. *See* W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 17 (1999) (acknowledging the potential for abuse).

120. MCDOUGAL & FELICIANO, *supra* note 7, at 210–11 & n.196; Rivkin et al., *supra* note 26, at 468.

121. As Reiter concluded in his study, "It takes a lot to provoke a state to preempt." Reiter, *supra* note 109, at 34.

122. *Id.* at 25–28.

internationally), avoiding international condemnation,[123] securing the loyalty of a critical ally, or even hoping to deny third-party support to an adversary. Reiter cites the following post-Charter examples: (1) Israel's postponing a proactive strike both in the context of the Six-Day War and the Yom Kippur War (in October 1973) so as not to put its close relations with the United States in jeopardy; (2) Egypt's decision against a first strike in the Six-Day War upon belief that, if Israel were perceived as the aggressor, the United States would withhold assistance to Israel; and (3) U.S. Attorney General Robert Kennedy's persuasion of his brother, President John F. Kennedy, that a surprise attack against Cuba in connection with the Cuban Missile Crisis would impose too high a political cost on the United States.[124]

States also have exercised considerable restraint and demonstrated risk-aversion during periods of tension by taking measures specifically designed to alleviate an adversary's concern about an impending attack.[125] Examples include two occasions during the Cuban Missile Crisis: the United States allowed a tanker to pass through the naval quarantine in order to give Soviet Premier Khrushchev more time to consider his options, and the Soviets, for their part, refrained from making preparations for general war so as not to provoke a U.S. preemptive action.[126] Such decisions to desist from the exercise of force in self-defense, however, are not always cost-free.[127]

3. Potentiality Assessment

In assessing whether an expanded *Caroline* standard would diminish the prospects of war, we must not only understand the empirical evidence but also consider states' capability to ascertain their adversaries' true intentions and predict with accuracy whether

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123. [States] strongly object to [international] condemnation and will make determined efforts to forestall censure by the U.N. That they do so shows that a condemnation of illegality by an international organ, even if not binding, is regarded as detrimental, imposing political costs on the offender . . . . Thus, we can plausibly infer that governments consider the possibility of such censure when they face a decision to use force.

Schachter, *supra* note 18, at 123. Such concern would only be amplified under a *clearer* standard governing proactive self-defense, as then the international community would be more focused on and generally aware of the permissible limits.

124. Reiter, *supra* note 109, at 25–26.

125. *Id.* at 28–32.

126. *Id.* at 29, 31.

127. The downside of not taking proactive defensive measures has been demonstrated in such cases as the October 1973 Yom Kippur War (Israel) and the August 1990 Iraqi invasion of Kuwait (Kuwait). Beres, *supra* note 85, at 78.

an attack is forthcoming. If states possess the requisite intelligence collection and analytical capacity to make such determinations, this would favor affording states greater operational leeway in self-defense; if not, an additional constraint would be in order, such as a more demanding evidentiary standard. Proponents of a broader standard claim that states are, in fact, fully equipped to make accurate determinations based on "modern methods of intelligence collection, such as satellite imagery and communication intercepts" and, therefore, they need not "await convincing proof of a state's hostile intent."[128]

There is, however, considerable skepticism that global intelligence capabilities can perform at a high enough level to consistently make the right call. To begin, intelligence is an imprecise science that is largely based on expert analysis of a mix of direct, indirect, and circumstantial data, only some of which is verifiable. Authoritative information is not typically available to the intended target state in armed conflict situations, and, therefore, predictions about an enemy's intentions are frequently inconclusive. Such determinations are complicated by "denial and deception" techniques used to throw off data collectors[129] and human sources who may share fabricated information.[130] Even with the benefit of sophisticated technological means, generally reliable human intelligence sources, and cooperative foreign intelligence services,[131] states are left to their best judgment and are most often unable to predict events (including attacks) with a high degree of certainty.[132]

There have, in fact, been some glaring historical failures to foresee even major conventional attacks by states with some of the world's most advanced intelligence capabilities.[133] Accordingly,

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128. Cohan, *supra* note 49, at 320.

129. *See* TENET, *supra* note 76, at 328 (describing "Iraq's extensive efforts to conceal illicit procurement of proscribed components").

130. *See id.* at 375–83 (discussing a source code-named "Curve Ball" who provided false intelligence on "mobile biological production trailers" in Iraq in 2000).

131. *See id.* at 125 (citing example of Jordanian intelligence chief sharing information with the CIA).

132. *See* Nabati, *supra* note 11, at 798 ("[I]n an age of weapons of instant destruction and concealed terrorist networks, it is hard—despite sophisticated intelligence capabilities—to establish with certainty when a terrorist attack is imminent."); Rivkin et al., *supra* note 26, at 484 (noting that it is very difficult to tell whether an attack is unavoidable; even with the most reliable intelligence estimates, it could be simply a show of force or preparations to negotiate from a position of strength).

133. *E.g.*, Istvan Pogany, *Nuclear Weapons and Self-Defense in International Law*, 2 CONN. J. INT'L L. 97, 105 (1986) (noting Israel's failure to predict Arab invasions to commence the 1973 Yom Kippur War, the UK's failure to anticipate Argentina's seizure of the Falklands/Malvinas in 1982, and the United States' failure to foresee the Soviet invasion of Czechoslovakia in 1968). However, to be sure, these events occurred decades ago and there is every reason to believe intelligence capabilities across the

detecting an imminent nuclear or biological weapons strike with a high level of confidence would be considerably more difficult.[134] *A fortiori*, states with inferior intelligence collection means and analytical acumen would be less able to predict accurately the likelihood and timing of a possible attack. The concern, of course, is that miscalculation could push states into unnecessary armed conflict.[135] Thus, when devising a legal standard to govern proactive self-defense, the evidentiary standard must be set sufficiently high to match the challenges states face in being able to consistently identify and render accurate assessments of threats to their security.

IV. METHODOLOGICAL CONSIDERATIONS

Having identified a baseline standard and developed evaluative criteria, this Part seeks to address those key methodological considerations that have a bearing on the formulation of the reform proposal.

First, the proposal constitutes more of an analytical framework than a detailed set of rules. The nature of self-defense and the use of force—given the vast range of possible threat scenarios, historical relationships between opposing states, and the various types of weapons, geographical contexts, tactics, and leadership profiles involved, among other factors—precludes a simple set of enumerated requirements.[136] At the same time, however, in the guise of an analytical framework, the proposal not only takes account of the substantive elements, such as necessity and proportionality, but also

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board have improved markedly in the intervening years—although so have states' abilities to conceal their military plans and activities.

134. *Id.* at 106.

135. Chris Bordelon, *The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law*, 9 CHAP. L. REV. 111, 137 (2005); Švarc, *supra* note 29, at 185.

136. In a sense this Article has adopted the "living document" approach as embodied in the UN Charter. A British delegate to the San Francisco Conference characterized this approach in the United Nations context as follows:

> [I]nstead of trying to govern the actions of the members and the organs of the United Nations by precise and intricate codes of procedure, we have preferred to lay down purposes and principles under which they are to act. And by that means, we hope to insure that they act in conformity with the express desires of the nations assembled here, while, at the same time, we give them freedom to accommodate their actions to circumstances which today no man can foresee . . . . We do not want to lay down rules which may, in the future, be the signpost for the guilty and a trap for the innocent.

Stromseth, *supra* note 54, at 563 (quoting Lord Halifax, Verbatim Minutes of First Meeting of Commission I, June 14, 1945, *U.N. Conference on Int'l Organization: Selected Documents*, 529, 537, U.N. Doc. 1006 (June 15, 1945)).

postulates a relevant evidentiary standard, procedural safeguards and a standard of review.

Second, the proposal seeks to embody the criteria set forth in Part III. Accordingly, the standard strives to avoid vagueness, ensure broad material application, and permit accountability for violations based on international community scrutiny. In addition, as the legal standard should apply to all states equally, including the least responsible, the guidance must not be susceptible to easy circumvention or abuse. Furthermore, the proposal is intended to address the full range of possible threat scenarios, whether a pin-prick strike or state survival itself is at stake.

Third, the proposal was not conceptualized with the *Caroline* standard or Article 51 of the Charter as a baseline; rather, it was approached as a "blue sky" exercise mindful only that the standard did not deviate from the fundamental tenets of international law. Additionally, the approach taken was not confined to seeking a standard specifically for anticipatory self-defense or preemptive self-defense, but rather one for proactive self-defense *writ large*.

Fourth, in contrast to most proposals that identify a set of requirements to be met, this proposal adopts an operational posture vis-à-vis the substantive elements of the standard. Thus, rather than setting forth the applicable criteria in static form, this proposal offers a dynamic approach that addresses the elements in the same logical order a state would employ when presented with an actual "use of force" decision.

V. PROPOSAL FOR REFORM

A. *Substantive Elements*

From an operational perspective, there are three discrete, essentially sequential steps for states deciding when and how to exercise proactive self-defense: (1) gauging the threat posed; (2) exhausting peaceful means of dispute resolution; and (3) responding to the threat. These three steps and their corresponding factors comprise the substantive portion of this proposal.

1. Gauging the Threat

When contemplating the use of proactive self-defense, a state must first evaluate the overall criticality of the threat posed—in particular, its nature and scale, likelihood, and timing.

i. Nature and Scale. A state must assess the character and magnitude of the perceived threat,[137] including, for example, the kind of weapons that might be used by the enemy (e.g., artillery, missiles, WMD) and their level of sophistication (e.g., Cold War-era munitions or cutting-edge technology); the size and competence of the armed force to be engaged (if any); whether it is expected to be an isolated assault, a medium-scale attack, or a massive onslaught; whether the attack is to be prosecuted with or without warning and with or without allied assistance; the likely targets of the attack; and the anticipated impact of the attack on the defending state's military force structure, its economy and infrastructure, and its civilian population. In estimating the outcome, the target state also must assess the ongoing effectiveness of its own defensive military capabilities.

A preliminary question to resolve is whether there is some minimal threshold for the nature and scale of an attack before self-defense can be lawfully exercised at all. The International Court of Justice (ICJ) in the *Nicaragua Case* established that a certain level of "gravity" was required, effectively ruling out low-level warfare.[138] While its ruling made clear that the mere provision of weapons, frontier incidents, the boarding of flagged vessels, or the equivalent would not qualify as an "armed attack" (as required to trigger the right of self-defense), the Court's opinion left some room for interpretation and, in any event, has been the subject of considerable criticism.[139]

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137. W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 88 (2003); Sofaer, *supra* note 10, at 220; Švarc, *supra* note 29, at 184.

138. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 195 (June 27). In effect, the Court distinguished between "the most grave forms of use of force" (those that rise to the level of armed attack) and "less grave forms" (those that do not). *Id.* ¶ 191; Natalino Ronzitti, *The Expanding Law of Self-Defense*, 11 J. CONFLICT & SEC. L. 343, 351 (2006). As one commentator observed, the Court imposed a "grave harm" limitation on the scope of "armed attack" and permitted self-defense only in cases where an attack has a traditional military character and causes a significant amount of harm. Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT'L L. 149, 155 (2006).

139. Critics have noted that neither the Charter nor collective self-defense treaties impose a condition of gravity to determine whether an "armed attack" has occurred, and that while gravity of the attack may be relevant to the proportionality analysis (i.e., *how* one responds defensively), it should have no effect on whether self-defense itself is permissible under such circumstances. *See, e.g.*, *Military and Paramilitary Activities*, 1986 I.C.J. at 543 (cautioning against construing Article 51's "armed attack" requirement too strictly to limit it to direct attacks by official state forces and observing that provision of arms to rebels coupled with other kinds of involvement, like providing logistical or other support, could amount to "armed conflict") (dissenting opinion of Judge Jennings); CHATHAM HOUSE PRINCIPLES, *supra* note 17, at 6 ("An armed attack means any use of armed force, and does not need to cross some threshold of intensity.").

There appear to be two general approaches available:[140] setting either a relatively high or a relatively low threshold. A high threshold would likely require a threat of "substantial magnitude" or one that entails "very serious consequences" or the like, below which no defensive force could be initiated.[141] A low threshold might consist of at least a *de minimis*[142] threat requirement, one understood to be of limited overall impact. The idea underlying the latter approach would be to ensure that any actual or perceived use of force beyond some superficial level would permit the targeted state to respond with defensive force.[143] In either case, a determination would need to be made as to whether the threshold was crossed. Relevant factors would likely include the number of combatants and destructiveness of weapons involved, the extent of human injury or physical damage likely to occur, and the geographical scope and expected duration of any military operations.

The *de minimis* threshold option is preferred for the following reasons: (1) a high threshold would be harder to ascertain and apply in practice under this multi-variable calculation and would likely create confusion and uncertainty in its implementation; (2) a high threshold might have the perverse consequence of effectively fostering low-intensity assaults, as aggressor states might feel at liberty to exercise such force with the reasonable expectation that defending states, lacking legal sanction, would forego an armed

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140. A third, more radical approach would permit the exercise of the inherent right of self-defense under any scenario in which a state perceived its security to be endangered, so long as its response is proportionate to the threat posed. Even if legally tenable, however, this approach would seem destabilizing and far more likely to result in hostilities.

141. *See, e.g.,* CASSESE, *supra* note 65, at 362 (proposing the existence of a "massive" threat, "such as [one] seriously to jeopardize the population or even imperil the life or survival of the State").

142. The complete term is "*de minimis non curat lex*." It is defined as "[t]he law does not concern itself with trifles." BLACK'S LAW DICTIONARY 464 (8th ed. 2004).

143. There is one important exception to this rule: when the initial *de minimis* force is reasonably perceived to be an integral part of a larger armed engagement that *does or likely would* exceed the *de minimis* threshold. This exception would frequently be implicated in the context of pin-prick strikes. One cannot say in the abstract whether an individual pin-prick assault itself necessarily would exceed the *de minimis* threshold for the gravity of force; however, taken together as part of a series, there is a much higher probability. *See* DINSTEIN, *supra* note 5, at 202 ("A persuasive argument can be made that, should a distinctive pattern of behaviour emerge, a series of pin-prick assaults might be weighed in its totality and count as an armed attack."); *accord* Ronzitti, *supra* note 138, at 351 (leaving open-ended the question whether a string of frontier incidents might cumulatively qualify as an "armed attack"). Therefore, the specific degree of force used in a given pin-prick strike, if part of a larger cycle or pattern of violence by the same source, should not itself necessarily be a bar to the exercise of self-defense. The question of the *severity* of that defensive force is a separate matter and is addressed as a function of the proportionality element *infra* Part V.D.3.

response;[144] (3) a low threshold is more consonant with the fundamental notion that self-defense is an inherent right; (4) a low threshold would still preclude self-defensive force in relatively innocuous situations that are most readily amenable to peaceful resolution; and (5) a number of precedents exist under domestic law for applying *de minimis* standards or rules that have been found highly beneficial.[145]

ii. Likelihood. A second element for consideration is the probability that, barring a proactive defensive strike, the threat would be realized.[146] This determination should be based primarily on the perceived intent and capabilities of the presumed aggressor state.[147] More concretely, numerous specific questions should be considered: Has the presumed aggressor publicly expressed its will to attack or has intelligence confirmed as much? Has it arrayed or deployed forces such that they are poised to attack? What lessons can be gleaned based on historical experience and what insights can be gained from the leadership profile of the enemy? Does the presumed aggressor have vital national interests or powerful domestic political concerns that might make it more likely to attack? What is the status of any ongoing negotiations between the states at issue, and has the United Nations, any military pact, or a global or regional power expressed a willingness to intervene? What is the presumed aggressor's overall technical competence, and does it believe it has the military strength sufficient to achieve its objectives? In this latter respect, the defending state also must take into account its own military capabilities, especially if a deterrent force structure exists.[148]

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144. *See* W. Michael Reisman, *Allocating Competences to Use Coercion in the Post Cold War World: Practices, Conditions, and Prospects*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 26, 39–40 (Lori Fisler Damrosch & David Scheffer eds., 1991) (noting that if a state responds to low-level activities with its own counter-force, the action itself may be considered in violation of international law, and explaining that states which have been extraterritorial targets of low-level attacks have sought to establish a norm allowing them to address the source of the offending activity with physical intervention).

145. *See* De Minimis Emission Levels for General Conformity Applicability, 71 Fed. Reg. 136 (July 17, 2006) (applying *de minimis* standards to control levels of particular environmental pollutants under the Clean Air Act); John N. Ohlweiler, *De Minimis Conditions of Employment: Must Management Always Bargain?*, ARMY LAW. (Nov. 2004), *available at* http://findarticles.com/p/articles/mi_m6052/is_2004_Nov/ai_n10299132/pg_5 (describing an emergence of a de minimis standard allowing management in federal employment to make minor managerial changes to employment conditions without bargaining with the union under certain circumstances).

146. Sofaer, *supra* note 10, at 220.

147. O'BRIEN, *supra* note 10, at 132–33; Glennon, *supra* note 53, at 552–53; Švarc, *supra* note 29, at 184.

148. Whether deterrence is premised on nuclear or conventional forces, the principle is the same: states generally are disinclined to attack if they can expect to suffer unacceptable losses in retaliation.

The likelihood determination will depend largely on its access to, and the credibility of, available intelligence.

Rather than select a standard based on a probability (e.g., "reasonable certainty" or "highly probable"),[149] an operational assessment is preferred, specifically one in which the decision to attack has become "effectively irrevocable."[150] Under this standard, the question regarding the attack is fundamentally not "if" but "when"—the uncertainty lies in whether the attack will occur sooner rather than later. This standard sets an appropriately high threshold for the likelihood element and comfortably satisfies the principle of necessity. Notably, this standard implies nothing about the temporal imminence of the attack (although irrevocability typically tends to be found close to the time of attack), and the passage of time generally should not materially affect the calculation.

It is acknowledged that "effective irrevocability" could prove to be a difficult determination that may require particularly well-sourced intelligence. Although it may occasionally turn out that, despite compelling evidence, the perceived aggressor state had been only posturing,[151] no legal system can demand perfection, and this standard would at least actively signal intolerance for any significantly militaristic, provocative, or war-mongering measures.

One would be hard-pressed to justify a less demanding test (e.g., a "reasonable likelihood" standard) because such a threshold would be more apt to result in the unnecessary exercise of "defensive" force. At the same time, it would be imprudent to impose a benchmark as high as "absolute certainty," given both the practical realities of obtaining such dispositive intelligence and the unwillingness of states to stand by while an enemy takes actions that clearly appear preparatory for an attack but whose motives could not be sufficiently verified. It must be conceded, however, that no legal threshold is entirely impervious to an erroneous calculation. Even if the evidence of an imminent attack appeared virtually iron-clad, any number of circumstances might arise at the eleventh hour—technological malfunction, change of strategy, or simply failure of nerve—that

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149. *See, e.g.*, Sofaer, *supra* note 10, at 221 (suggesting that a "very likely" determination of a threat materializing should be used).

150. *See* CHATHAM HOUSE PRINCIPLES, *supra* note 17, at 8 (relying on the concept of irreversibility); Hofmeister, *supra* note 11, at 45–47 (calling for "irrevocable commitment").

151. It has been suggested this may have been the case with Egypt immediately prior to the Six-Day War. DINSTEIN, *supra* note 5, at 192; John Quigley, *The United Nations Action Against Iraq: A Precedent for Israel's Arab Territories?*, 2 DUKE J. COMP. & INT'L L. 195, 203–13 (1992).

would result in a state backing down from an intended attack.[152] Indeed, there is historical precedent for such behavior.[153]

iii. Timing. Closely linked to the likelihood of an attack is the third factor in sizing up the threat—urgency. The anticipated timing of an attack will not only determine whether an opportunity remains to resolve the dispute through peaceful means, but also whether a state can avoid speculative defensive actions.[154] Practically speaking, there are three major approaches to erecting a standard with regard to urgency: (1) insisting on the current requirement of temporal imminence; (2) allowing the exercise of self-defense once an essentially "coherent" threat has coalesced;[155] or (3) mandating a "last window of opportunity" standard for armed engagement.[156]

The "last window of opportunity" logic supposes that a present danger (i.e., a specific attack threat) is known and that any additional delay in acting would "seriously compromise security."[157] Because the underlying rationale of the imminence requirement is to ensure military action is truly necessary,[158] a "last window" approach should be no less suitable, as it similarly minimizes the risk of premature force and reflects the absence of any effective alternative.[159] This approach also arguably comports with the international human rights law standard governing the use of force.[160]

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152. *See* BROWNLIE, *supra* note 24, at 259 ("[E]ven if a state is preparing an attack it still has a *locus poenitentiae* [an opportunity to change one's mind] prior to launching its forces against the territory of the intended victim.").

153. *See* Rivkin et al., *supra* note 26, at 484 (citing the 1909 Austrian Annexation of Bosnia-Herzegovinia and the 1911 "Agadir Crisis" prior to World War I).

154. Švarc, *supra* note 29, at 184.

155. *See* Bradford, *supra* note 82, at 1396 (describing options).

156. This Author avoids the term "last clear chance" that is sometimes used interchangeably with "last window of opportunity" (e.g., Martinez, *supra* note 72, at 171) because, although the phrase conveys the same meaning, the term "last clear chance" has a specific doctrinal significance that permits recovery by a plaintiff in a civil lawsuit when he would otherwise be barred based on his or her contributory negligence, see *Bence v. Teddy's Taxi*, 297 P. 128, 130 (Cal. Dist. Ct. App. 1931), and to that extent could prove misleading.

157. Polebaum, *supra* note 11, at 211.

158. *See* Rockefeller, *supra* note 72, at 142 ("The requirement of imminence is meant to assure the necessity of an act.").

159. *See* Rex J. Zedalis, *Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense*, 19 CASE W. RES. J. INT'L L. 129, 146 (1987) (stating that for defensive force to be justified, there must be a threat "leaving no moment for deliberation," but noting that a rule allowing resort to anticipatory force in response to an existing imminent threat of attack reduces the likelihood that such force will be mistakenly used).

160. *See* Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, princ. 4 (implying a "last window" logic by virtue of making no reference to imminence: "Law enforcement officials . . . may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result."); *accord* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 EUR. J. INT'L

To see how this "last window" approach would apply in a real-world situation, consider Israel's 1981 strike on Iraq's nuclear reactor.[161] Putting aside for the moment the requisite standard of proof,[162] if Israel could show that: (1) Iraq was devising a nuclear weapon rather than merely gearing up for commercial power generation at the Osirak facility; (2) the weapons fabrication effort was reasonably close to completion; and (3) Iraq had concrete plans or genuine intentions (rather than spouting mere grandstanding rhetoric) to strike Israel with a nuclear weapon once acquired, Israel would have a colorable case to strike under the "last window" construction of likelihood. In that instance, waiting any longer to destroy the facility would only increase the risks to the Iraqi civilian population (given the greater radioactive dissemination that would ensue from a delayed military campaign targeting the reactor), and once the weapon was produced, it could be stored in any number of possible locations or deployed on any one of multiple missiles or bombers, rendering its later neutralization infinitely more difficult. Given the operative facts in that case, the first two propositions appear entirely tenable, though the third remains more open to question.[163]

Temporal imminence provides a less satisfactory benchmark. To begin, a time-gap does not always exist; that is, attack preparations are not always apparent to the targeted state, especially given the speed and secrecy with which weapons can be delivered.[164] There also may be a certainty (or near-certainty) that at some undisclosed time and place, but not necessarily imminently, an attack will occur based on the "on-going, intermittent or cyclical nature of the danger

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L. 171, 182 (2005) (describing a viable approach under human rights law that would enable law enforcement officers to target and kill terrorists where "the unlawful violence [for which the terrorists would be responsible] might not be imminent, but the need to use lethal force in order to prevent that violence might be immediate, since if such force is not used now it may not be possible to prevent the violence later").

161. *See supra* text accompanying note 103.

162. *See* discussion *infra* Part V.A.1.v.

163. Among the factors militating against Israel regarding this third variable would be: (1) the paradoxical nature of nuclear weapons that renders their awesome power less useful as an offensive force than as a deterrent, as evidenced by its categorical non-use by nuclear states over the past six decades, and (2) the need for Saddam Hussein to have weighed the heavy risk to Iraq of a potentially devastating retaliatory Israeli nuclear strike, based on a widely held understanding that Israel possessed a large store of nuclear weapons, notwithstanding its lack of any official confirmation to that effect. *See* Michael Ottenberg, *Estimating Israel's Nuclear Capabilities*, 30 COMMAND 1, 6–8 (1994) (estimating that in 1980 Israel may have had 200 nuclear weapons).

164. *See* discussion at Part III.B.2 *supra*. Temporal imminence, as grounded in the *Caroline* standard, arose at a time when the nature of warfare was vastly different; there were neither instantaneously destructive weapons like WMD nor missiles that could deliver them without adequate warning. BROWNLIE, *supra* note 23, at 368; Yoo, *supra* note 98, at 750.

and manifested through previous acts or statements of intent."[165] In other instances, a time-gap might exist, but the circumstances might not realistically permit a defending state to wait until the threat has become imminent.[166] Further, if waiting for a threat to become imminent means holding off until a state cannot effectively defend itself, then it is left with the unacceptable alternative of suffering the first blow.[167]

At the same time, a mere "coherent" threat standard would be an inappropriate—and potentially more unstable—basis for gauging urgency. This approach is dangerously comparable to the concept of "preventive war," where decision making turns entirely on speculation and assumptions. War could commence on the precarious basis of what might happen, rather than on what is highly likely or almost certain to occur. Even Otto von Bismarck opposed the idea of preventive war on the grounds that one "can never anticipate the way of divine providence securely enough for that."[168] Errors and miscalculations could run rampant, states could more easily rely on this tenuous standard to justify the use of force on pretextual grounds, and it would be harder to identify violators.

Factors that should be taken into account in ascertaining the timing of a threatened attack include: (1) the nature and extent of military developments or location of military deployments by the presumed aggressor; (2) the political rhetoric or public expressions of intent by the presumed aggressor; (3) the capability of the presumed aggressor to mount the type of attack anticipated; (4) the status of diplomatic negotiations (if any) between the presumed aggressor and the target state; and (5) the geographical distance the attack would

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165. Rockefeller, *supra* note 72, at 144.

166. *See* Taylor, *supra* note 51, at 68 ("[A] potential attack may be overwhelming but not be potentially 'instant' and, given the more lethal threats today, justify the use of [proactive] self-defense.").

167. Kacerauskis, *supra* note 83, at 89; *see also* Rockefeller, *supra* note 72, at 139 (discussing the problem of temporal imminence through the "Sailor's Dilemma," a hypothetical developed by Prof. Paul Robinson).

> A slow leak is found by a crew of a seagoing vessel shortly after the ship leaves port for a long journey to a remote part of the ocean. The ship's Captain refuses to heed to the crew's pleadings to cancel the journey. The slow leak will take two days to sink the ship; thus, it poses no *immediate* risk. However, absent intervention, the leak poses a definite and certain *future* risk of sinking the ship. The dilemma: may the sailors mutiny to gain control of the ship now, while they are still close to shore and the chances of survival are high, or must the crew wait until the sinking is temporally imminent (immediate), even if waiting means they will be farther away from the shore and will have a decreased chance of survival?

Rockefeller, *supra* note 72, at 139 (emphasis in original).

168. Laver, *supra* note 86, at 113–14.

cover, based on the location of the assets to be employed and the likely targets.

iv. *Summary of Key Indicators*. It should be clear at this point that any realistic formula for gauging the threat of an attack would have to account for an enormous breadth of possible permutations. Compiled into a short checklist, the most critical factors required for evaluating a threat of attack, filtered through the reliability quotient of a state's available intelligence, would include:

- Character, method, and consequences of the presumed attack (including the nature and extent of any military developments and deployments, whether the strike is to be delivered with or without warning, whether any military allies will assist the presumed aggressor, the type of weaponry to be used, whether state survival is at stake, and what human, infrastructural, economic, and military ramifications can reasonably be expected from an attack);
- Intent of the presumed attacker (including its current rhetoric, any ideological tensions that might exist, profiles of its military and political leaders, its internal pressures and national interests, and the extent and recency of any relevant hostilities to date);
- Capacity and the time available to mount an effective defense (including the geographical distance from the presumed attacker, the existence of any deterrent capability, and the anticipated assistance of any military allies); and
- Nature and extent of any reaction to the situation by the international community (including, most notably, the UN Security Council or General Assembly, a collective security organization, or a global or regional power).

v. *Evidentiary Standard*. It is now necessary to determine the level of evidence required to demonstrate the existence of a genuine security threat, or what is referred to herein as a "serious and urgent need."[169] The evidentiary standard addresses the nature, quality, and reliability of a state's information about the underlying facts and circumstances that have led it to decide to act against a given threat.[170] Five interrelated questions arise in this context: (1) What is the basic philosophy governing the evidentiary standard? (2) Is there a useful precedent to draw upon from the civil or criminal law tradition? (3) Which standard ultimately is most appropriate in this

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169. This phrase was selected as it captures the three fundamental elements required to trigger self-defensive force: seriousness, urgency, and necessity while dispensing with the inflexible *Caroline* notion of temporal imminence.

170. The "evidentiary standard" differs from the "standard of review" (discussed *infra*) in that the former relates to the threshold of proof for the existence of a threat to justify a state's decision to act, while the latter relates to an ex post evaluation by the international community of the lawfulness of the conduct undertaken by that state.

context? (4) What should be the scope of application of that standard? (5) Should any presumptions be introduced and, if so, in whose favor?

a. *Basic Philosophy*. The evidentiary standard should impose a heavy burden on the defending state, particularly in light of the high stakes involved and the diminished opportunity a high burden would present for miscalculation or pretextual strikes. This point is reinforced by the aforementioned concerns about the capability of global intelligence services at all levels of sophistication to consistently ascertain and accurately assess threat information. At the same time, in a world that assigns such a high premium to secrecy, deception, and surprise in its military engagements, the standard must not be set impractically high.[171]

b. *Finding Precedent in Civil or Criminal Law*. It is more sensible to look to civil law than to criminal law (within the common law tradition) for the appropriate standard. Use of force is not a matter that entails investigating crimes by law enforcement officers or holding states criminally liable.[172] Thus, criminal law standards are inapposite.[173] In addition, criminal law standards, such as reasonable suspicion, probable cause, and reasonable doubt, are cast in terms of confidence levels, whereas the civil law standards, such as "preponderance of the evidence" and "clear and compelling evidence" (also expressed as "clear and convincing evidence"), focus on the degree of proof required, which is more aptly called for in this context.

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171. Proposals for unacceptably high standards include calls for "incontrovertible evidence" of an imminent attack, Pogany, *supra* note 133, at 106, and "beyond a reasonable doubt," Rockefeller, *supra* note 72, at 144.

172. Although international law recognizes the crime of aggression in concept, it remains undefined. Rome Statute of the International Criminal Court (ICC) art. 5, UN Doc. A/CONF. 183/9 (July 17, 1998), 37 I.L.M. 1002 (entered into force July 1, 2002), *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf. Even so, that "crime" would apply to state leaders, not to states themselves, and aggression is not a prerequisite to the exercise of self-defense. It is also noteworthy that states resisted attempts to introduce "international crimes" into article 19 of the 1996 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 16–20 (2002) (noting states' "[s]trong reservations" and characterizing idea as "divisive"). Accordingly, the *Draft Articles* contain no reference to "international crimes." Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, arts. 40–41, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

173. Some, however, have proposed requiring a defending state to prove that the presumed aggressor had violated international law in order to justify the resort to self-defense. The Author believes that would be inadvisable not only because that requirement would effectively invalidate proactive self-defense but also because self-defense, at bottom, is an inherent right. *Accord* CHATHAM HOUSE PRINCIPLES, *supra* note 17, at 41–42 (stipulating that no proof of breach of international law should be required).

c. *Selecting the Most Appropriate Standard*. Drawing from civil law standards, it is proposed that a defending state must show with "clear and compelling evidence" the existence of a "serious and urgent need" with respect to a given threat. First, this would amount to the heaviest civil law evidentiary burden available and thereby would most effectively eliminate misperceptions or deliberate abuse.[174] Second, "[e]ven though no express standard of proof exists in public international law, 'clear and compelling' seems to be an acceptable standard."[175] Commentators largely concur with this approach.[176] Third, insisting on a heavy burden would provide small states with an added benefit because they would be less vulnerable to the pretextual use of self-defensive force by larger or more powerful states than they would under a lower standard.[177]

d. *Scope of Application of the Standard*. The evidentiary standard should apply uniformly to the nature and scale, likelihood, and timing dimensions that contribute to finding a "serious and urgent need." The three dimensions must represent integrated parts of a whole, each warranting equally careful scrutiny. That said, this standard of proof should apply only to the threat assessment and not

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174. Garwood-Gowers, *supra* note 57, at 16; *accord* Martinez, *supra* note 72, at 167 (suggesting more than "reasonable suspicion" to keep burden high).

175. Hofmeister, *supra* note 11, at 48; Martinez, *supra* note 72, at 167. When the Security Council "demanded the surrender of the Libyan suspects regarding the Lockerbie incident and of bin Laden regarding the Embassy bombings in Africa," it appears to have relied on the lower "prima facie" standard of proof, but that practice was a function of collective enforcement versus unilateral action. Yee, *supra* note 46, at 290. The United States justified its self-defensive measures in Afghanistan to the Security Council following the September 11 attacks on the basis of "clear and compelling information," and the Security Council registered no objection. Schmitt, *supra* note 31, at 757; Hofmeister, *supra* note 11, at 48. It should be noted, however, that this representation was made in reference not to evidence of *future or ongoing attacks* against the United States or its allies but in reference to *identifying* "the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan" as playing a "central role in the attacks." Letter from John Negroponte, Perm. Rep. of the U.S. to the UN, to Pres. of the U.N.S.C., U.N. Doc. S/2001/946 (Oct. 7, 2001). Significantly, when the United States sought NATO operational support in Afghanistan, it presented "compelling" evidence that Al-Qaeda was *planning further attacks*. O'CONNELL, *supra* note 6, at 10–11 & n.53.

176. *See* Cohan, *supra* note 49, at 355 (suggesting that there must be compelling evidence to satisfy an injury of anticipatory self-defense and the appropriate standard should be greater than a preponderance of the evidence and lower than beyond a reasonable doubt); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 551 (1999) (discussing a reasonable standard as being supported by "clear, unequivocal and convincing evidence").

177. *See* Rockefeller, *supra* note 72, at 146 (suggesting that a standard of "weighing of damages" would benefit smaller states).

to questions of exhaustion of peaceful dispute settlement means or the responsive action itself.[178]

e. *Presumptions.* When a standard of proof is under consideration, the law will sometimes accord a presumption that the evidence presented is to be viewed in the light most favorable to one side. Here, however, it seems advisable to maintain a neutral posture and not lend the benefit of the doubt to either the presumed aggressor or the defending state. There is no principled basis to so favor the presumed aggressor, nor should we diminish in any way the high standard of proof to which the "defender" should be held.

2. Exhausting Peaceful Alternatives

Once a state has assessed a presumed aggressor's threat, based on the evidentiary standard set forth above, it must ensure that it has already exhausted nonmilitary alternatives to repel the threat or otherwise undertake to do so actively, faithfully and promptly. Such alternatives may include engaging in bilateral diplomacy (through negotiation, mediation, or arbitration); referral to the Security Council; solicitation of assistance from regional security organizations (whose support may exert a deterrent effect on a potential aggressor); or even the use of peaceful incentives, disincentives, or counter-threats.[179]

As discussed above, the necessity principle—namely, that military force should be used only if truly necessary—implies that all realistic means of peaceful resolution have been fully explored.[180] This requirement is consistent with Articles 2(3) and 33 of the UN Charter.[181] Although exhaustion of peaceful recourse is roundly

178. *But see* Martinez, *supra* note 72, at 167 (requiring a defending state to show it had satisfied the exhaustion of peaceful means based on "clear, unequivocal and convincing" or "clear, cogent and convincing" evidence).

179. Countermeasures, which are non-armed efforts intended to encourage another state to comply with its international legal obligations (e.g., expelling foreigners from one's territory or freezing financial assets), would be available as well, but only in response to an internationally wrongful act. *Draft Articles on State Responsibility*, *supra* note 172, arts. 49–53.

180. Of course, to the extent a defending state learns of an imminent threat that, as a practical matter, leaves no time to pursue peaceful recourse, such measures would be deemed unavailable.

181. Article 2 provides: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. Charter art. 2, ¶ 3. Article 33 imposes a substantially similar, although not identical, mandate: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. Charter art. 33, ¶ 1.

accepted in principle,[182] one could imagine several possible permutations. The requirement could, for instance, call for: (1) good faith efforts or those that appeared subjectively reasonable to the defending state; (2) an objective effort to explore every available peaceful measure; or (3) an objective effort subject to some condition, such as exhaustion of any feasible and meaningful alternatives to armed force. The last option is preferred; it would require the exhaustion of all reasonable and worthwhile prospects for resolution, treating other theoretically available options as irrelevant.[183] This approach would ensure that every bona fide, non-facially futile alternative to force had been explored and thereby insist on strict accountability. It is readily acknowledged that the term "meaningful" is open to interpretation; however, states would be expected in good faith to treat this term expansively rather than restrictively in light of its purpose, and their efforts (or lack thereof) ultimately would be subject to a reasonableness review.[184] To reinforce this requirement, the pursuit of peaceful alternatives should be treated not as a contingency option but as an affirmative and continuing duty.[185]

3. Taking Responsive Action

Upon determining that a "serious and urgent need" exists and having exhausted the requisite peaceful alternatives, a state may well be prepared to launch a first strike in self-defense. Any such defensive measure must, however, meet two central requirements: such conduct must be strictly necessary and tailored to repel the threat posed, and it must comply with applicable international agreements and obligations.

i. Necessary and Tailored to Repel the Threat. The use of defensive force must be necessary to avert or repel a given military threat or else such force might serve an improper purpose, such as retaliation for past acts or territorial annexation.[186] A proactive defensive strike, however, could have the collateral benefit of general deterrence so long as it was principally aimed at thwarting a genuine

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182. CHATHAM HOUSE PRINCIPLES, *supra* note 17, at 7; Gill, *supra* note 14, at 362; Polebaum, *supra* note 11, at 212; Sofaer, *supra* note 10, at 220.

183. *Accord High-Level Panel Report*, *supra* note 10, ¶ 56(c) (posing the question: "Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?").

184. *See infra* Part V.C.

185. *See* Polebaum, *supra* note 11, at 212 (endorsing concept of exhaustion as an "affirmative duty"); Sofaer, *supra* note 10, at 223 (calling for a "continuing duty").

186. *See* Bonafede, *supra* note 97, at 213 (discussing improper U.S. retaliation by launching missile strikes in Afghanistan and Sudan); Švarc, *supra* note 29, at 179 (stating that self-defense must not be retributive or punitive).

military threat.[187] In addition, the responsive measure must stand a reasonable chance of success in meeting its objective.[188] If the defending state does not believe the particular force exercised will avert or otherwise diminish the threat, then logic dictates that such force would be fruitless and hence unnecessary.

Further, the defensive action must be tailored to repel the threat posed, thereby implicating the *jus ad bellum* proportionality principle. Consistent with that principle, the intensity of force used need not be commensurate with the degree or quantum of force threatened.[189] Instead, proportionality of force is a function of the objective sought and, thus, the force must be no greater than strictly needed to repel the given threat.[190] As a result, there is a fair chance that the quantum of defensive force used will in fact exceed that presented by the threat itself. After all, it is difficult to judge in advance both the precise degree of force threatened and the extent of military power required to repel it.[191] As a prudential constraint, therefore, an outer limit on the *damage* wrought (versus the quantum of *force* used) is needed, based upon the "balance of consequences" principle.

This principle weighs the estimated consequences of proactive defensive action (i.e., what damage the "defending" state likely would cause the enemy) against the consequences of not taking proactive defensive action (i.e., what damage the presumed aggressor state likely would cause).[192] In most cases, the proportionality test would dictate the upshot and result in a level of damage below that anticipated by the threatened attack because the defending state is only entitled to thwart the threat to the extent necessary. Thus, the balance of consequences principle likely would apply only in exceptional instances where repelling the threat would entail a level of destruction or death exceeding that of the feared attack.

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187. *See High-Level Panel Report*, *supra* note 10, ¶ 207(b) (relying on a primary purpose test).

188. *Id.* ¶ 207(e); Hofmeister, *supra* note 11, at 49–50 (noting this factor tracks with just war theory).

189. *See supra* note 35 and accompanying text.

190. *See supra* note 36 and accompanying text; Nydell, *supra* note 16, at 489 (citing the Israeli attack on Osirak as an example of a proactive defensive strike that satisfied the proportionality criteria: "The fact that [it] was strictly limited to one nuclear facility, and was not a precursor to further attacks upon Iraq, gives credence to the view that Israel believed it was acting in a purely defensive manner. Certainly, the raid was planned to minimize the possibility of casualties.").

191. BROWNLIE, *supra* note 24, at 259; GARDAM, *supra* note 9, at 179; WICKER, *supra* note 35, at 59–60.

192. *See High-Level Panel Report*, *supra* note 10, ¶ 207(e) (posing for consideration in a state's decision calculus: "Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?").

Determining where precisely to strike the proper balance in such cases, as applied in good faith, presents several options. The level of damage expected by the defensive force could be set, for example: (1) necessarily lower than the anticipated consequences of the threatened attack;[193] (2) roughly equal or comparable to the anticipated consequences of the threatened attack; or (3) not significantly higher than the anticipated consequences of the threatened attack.[194] The point here is not to unduly burden the defending state even, conceivably, to the point of eliminating military options that would otherwise pass muster under the proportionality principle (as in the "necessarily lower" case). Rather, the goal is to place a reasonable upper limit on the consequences of a defensive first strike while, at the same time, insisting on a calibration that would not be too susceptible to misunderstanding or exploitation (as in the case of "not significantly higher"). From this perspective, the middle option offers the best course.

Another question that arises is how to define the scope of the threat to be repelled. Is it the immediate threat posed or the more generalized threat emanating from a particular source? Views on this matter vary widely. Three principal schools of thought have been identified: (1) the "eye-for-an-eye" school which dictates that the response must be limited to extinguishing the immediate threat only; (2) the "cumulative effects" school, permitting a defensive measure to strike at the adversary to a degree on par with the aggregate harms it has caused over time; or (3) the "eye-for-a-tooth" school in which the strike may seek to expunge the overall threat posed by taking a more aggressively deterrent posture to future attacks.[195] The governing standard should be the "eye-for-an-eye" approach,[196] as it tracks most closely with the limited and tactical function of self-defense. Furthermore, the other approaches would be far more difficult to delineate from an operational standpoint; for example, how many past attacks would qualify within the cumulative effects test,[197] and

193. *See* Cohan, *supra* note 49, at 355 ("The probable damage to be done by any preventive action should be markedly less than the anticipated injury.").

194. *See* CHATHAM HOUSE PRINCIPLES, *supra* note 17, at 10 ("The physical and economic consequences of the force used must not be excessive in relation to the harm expected from the attack.").

195. AREND & BECK, *supra* note 44, at 165–66 (discussing alternatives); *see also* William H. Taft IV, *Self-Defense and the* Oil Platforms *Decision*, 29 YALE J. INT'L L. 295, 299 (2004) (embracing the deterrence view wherein proportionality would not be pegged to the attack immediately preceding the defensive measure but rather to the overall threat posed).

196. Applying such a proportionality analysis in the context of combating terrorists (absent state attribution) lies beyond the scope of this article.

197. Bonafede, *supra* note 97, at 184.

how extensive a force could be used if intended to deter future attacks writ large?[198]

ii. Compliance with International Obligations. The use of proactive defensive force also must fully comply with applicable international obligations, most notably including those reflected in: (1) the UN Charter (e.g., deferring to the Security Council once it "has taken measures necessary to maintain international peace and security"[199]); (2) customary international law; (3) the Geneva Conventions of 1949 and, to the extent it constitutes customary international law, Additional Protocol I of 1977 (including the principles of discrimination, military necessity, and proportionality under *jus in bello*); and (4) any relevant weapons conventions (e.g., the 1993 Chemical Weapons Convention).

B. *Procedural Safeguards*

Certain procedural safeguards will help reinforce the effectiveness, and otherwise facilitate execution, of the substantive elements discussed above.

1. Burden of Proof

The burden to prove that the threat posed was sufficiently great to warrant action (i.e., that it rose to the level of a "serious and urgent need") should lie with the state that moved to strike proactively.[200] Although that state might well perceive itself to be merely acting in self-defense and not to have provoked hostilities, as the first to use force it must justify its threat assessment under the applicable evidentiary standard. This procedural requirement tracks the existing rule.[201]

2. Requirement Prior to Taking Action

The only procedural rule that should be imposed on a state prior to its exercising proactive defensive force is to refer its concerns to the Security Council to the maximum extent possible consistent with the

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198. In applying this concept of proportionality to the scenario involving a series of pin-prick strikes, the target state should define the immediate threat narrowly to determine what is strictly necessary to repel it. Under the proposed approach, the target state's defensive action could lawfully exceed the *force* expected to be used against it, but the expected *consequences* would have to aim in good faith to meet the "roughly comparable" standard outlined above.

199. U.N. Charter art. 51.

200. Rockefeller, *supra* note 72, at 145.

201. *See supra* note 41 and accompanying text.

standard outlined above for exhausting peaceful alternatives.[202] Procedures recommended by others, such as requiring states to warn a presumed aggressor before commencing a defensive assault[203] or to publicize the anticipated threat in order to spur dialogue or diplomacy,[204] are unobjectionable to the extent they prove feasible and meaningful as peaceful means of dispute resolution in a given circumstance, but this Author would not categorically mandate them.

3. Requirements After Taking Action

Two procedural requirements are essential following the proactive use of force in self-defense. First, in accordance with Article 51, a state must immediately report its defensive action to the Security Council.[205] Second, to the extent the threat information upon which a defending state relied in determining a "serious and urgent need" was not observable, verifiable, or otherwise available in the public domain, the state must affirmatively meet its burden under the "clear and compelling" standard of proof. To that end, evidence upon which the defending state based the need to act must be made available to the international community at large,[206] including, at a minimum, to the United Nations. To be sure, however, prudential limits on such scrutiny should be recognized (as they are in U.S. federal courts and other foreign domestic and international criminal tribunals) with respect to the disclosure of sensitive intelligence sources and methods.[207] This requirement is not a material departure from the current standard, under which a state must put forth evidence that it acted reasonably under the circumstances.

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202. *Accord* Martinez, *supra* note 72, at 168–69 (requiring recourse to the Security Council in "all but the most urgent circumstances").

203. Cohan, *supra* note 49, at 355.

204. Polebaum, *supra* note 11, at 210.

205. U.N. Charter art. 51. Indeed, it is in a state's self-interest to report to the Security Council, as the ICJ has opined that "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence." Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 200 (June 27).

206. Hofmeister, *supra* note 11, at 48; Martinez, *supra* note 72, at 180–81.

207. *See* CHATHAM HOUSE PRINCIPLES, *supra* note 17, at 9 (suggesting that there should be "proper internal procedures for the assessment of intelligence and appropriate procedural safeguards"); Martinez, *supra* note 72, at 167–68 (recognizing that limits should be placed so as to respect certain intelligence sources). For example, some intelligence material might be amenable to production in summary or redacted form to protect sensitive national security information while still satisfying the evidentiary burden. *See, e.g.*, Classified Information Procedures Act (CIPA), Pub. L. No. 96-456, § 6(c), 94 Stat. 2025, 2025 (1980) (discussing alternative procedures for the disclosure of classified information).

4. Accountability

A state's use of defensive force would ideally be subject to international review in the first instance by the Security Council, which not only has "primary responsibility for the maintenance of international peace and security"[208] within the UN, but also "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[209] Although the Council is thus a uniquely situated forum for the review of "use of force" decisions by states, it is unclear how its five permanent members—the United States, China, the United Kingdom, France, and Russia[210]—could be held strictly accountable for any violations of their own in the exercise of proactive self-defense. After all, they have the express power to veto any resolution condemning their behavior or requiring reparations.[211] Although questions of UN procedural reform are beyond the scope of this paper, and this Author would disfavor any reform that dispensed with the veto power,[212] it remains open to question whether there could be a place for binding international arbitration between a permanent Security Council member state that exercised "defensive" force and the perceived aggressor state, at least in a situation where, but for the single veto exercised by the permanent member at issue, the Security Council unanimously[213] found that member to have acted unlawfully.

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208. U.N. Charter art. 24. The Security Council's responsibility is "primary"—not exclusive—within the Charter regime, so that the General Assembly could also potentially play this international review role.

209. *Id.* art. 25.

210. *Id.* art. 23. Russia is the recognized successor in this regard to the Soviet Union.

211. *Id.* art. 27, ¶ 3 (requiring in nonprocedural matters not only "an affirmative vote of nine [of 15] members" but also the "concurring votes of the permanent members"). Although a permanent member always could be held "accountable" politically to the extent that states can communicate their disapproval through diplomatic statements and voting behavior, we are concerned here with strict accountability in the formal and institutional sense.

212. *Accord* U.N. Charter arts. 27, ¶ 3; *id.* art. 52, ¶ 3 (requiring a permanent member to abstain from a Security Council vote when such a member is a "party to a dispute" in connection with a Council action to "encourage the development of pacific settlement of local disputes"). *Contra* CASSESE, *supra* note 65, at 363 (calling for a permanent member to "forgo its veto power when voting" on the lawfulness of its own preemptive force in self-defense).

213. "Unanimous" in this context means either a 14–1 vote of the Security Council or any other result involving abstentions in which the permanent member at issue otherwise stood alone in defending the lawfulness of its allegedly defensive use of force.

This modest concept,[214] which would apply only in the most extreme cases, would foster a greater sense of fairness and adherence to the rule of law, provide a buffer against significant abuses and impunity, and more strictly adhere to the principle of the sovereign equality of states.[215] This approach also would demonstrate good will on the part of the permanent members while reflecting the notion articulated in the Charter preamble that states are to act in the international community's "common interest."[216] Moreover, placing the merits of the case in the hands of an arbitration panel (with one arbitrator chosen by each party and one or more neutral members selected jointly by the other two) should allay any potential concern about a politicized decision maker.

C. *Standard of Review*

The standard of review lies at the heart of this analysis as it determines how the international community—principally represented by the Security Council, but also conceivably by the General Assembly, an international tribunal like the ICJ, or an international arbitration forum like the Permanent Court of Arbitration[217]—will judge the lawfulness of a state's exercise of

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214. Binding arbitration between states, including in recent years by Security Council permanent members, is not without precedent. *See, e.g*, Rainbow Warrior Case (N.Z. v. Fr.), 82 INT'L L. REP. 499 (Fr.-N.Z. Arb. Trib. 1990) (concerning an extradition request by France and a demand for reparations by New Zealand arising out of the destruction by French agents of a civilian ship docked in Auckland); Abraham Abramovsky, *Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in* United States v. Yunis, 15 YALE J. INT'L L. 121, 157 & n.177 (1990) (noting that the United States and the Soviet Union agreed to submit to binding arbitration by the ICJ with respect to disputes over the interpretation of seven treaties dealing with such issues as hijacking and acts of terrorism). More aggressive approaches not endorsed here might include requiring states that use force in self-defense to "consent to the jurisdiction of the International Court of Justice for any violation of international law." Nabati, *supra* note 11, at 800–01.

215. *See Declaration on Principles of Int'l Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV) (Oct. 24, 1970).

> All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political, or other nature . . . . (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

216. U.N. Charter pmbl. (stating that member states agree "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest").

217. The Permanent Court of Arbitration in The Hague has been utilized to resolve various kinds of inter-state disputes. *E.g.*, Eritrea-Ethiopia Claims Commission, Awards on Prisoner of War Claims, Perm. Ct. of Arb., July 1, 2003, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1151.

proactive self-defense.[218] The consequences that might befall a state that failed to satisfy the standard of review would be left to the judging body, but it would seem appropriate that states found to have acted unlawfully be willing, at a minimum, to make reparations to an injured state.[219] The key determinant for that review should be the notion of reasonableness. The discussion of that concept proceeds under the following three subheadings: (1) the value and benefits of reasonableness as a guiding principle; (2) selecting a specific type of reasonableness; and (3) matters relevant to applying reasonableness.

1. Value and Benefits of Reasonableness

Reasonableness has been described as "that most comprehensive and fundamental test of all law."[220] Its principal merits in this context are four-fold: (1) it provides a "disciplined" framework for evaluation;[221] (2) it introduces a significant degree of objectivity into the calculation by embodying the "basic principle that no nation

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218. The idea of state conduct being reviewed and enforced by a collective body or adjudicative panel may seem self-evident today; however, it stands in marked contrast to the evaluative scheme on which the ill-fated Covenant of the League of Nations was based. Under the Covenant:

> [I]t was left to each member to decide whether a breach had occurred or an act of war had been committed, so that even the obligation to apply economic sanctions under Article 16(1) was dependent on the member's own view of the situation. Military sanctions could be recommended by the Council [of the League], but the decision on whether to apply them rested with each member.

DEREK W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 17–18 (Steven & Sons 4th ed. 1982) (1964). Likewise, under the Pact of Paris of 1928 (also known as the Kellogg-Briand Pact or the General Treaty for the Renunciation of War), "no competent body was established to determine whether a State employing force was acting in self-defence or in breach of the Pact." DINSTEIN, *supra* note 5, at 84.

219. *See* CASSESE, *supra* note 65, at 362–63 (proposing that if the use of force was unlawful, then the "State concerned must be ready to pay compensation to the State attacked"). The International Law Commission identifies various forms of reparation for an "injury caused by the internationally wrongful act," including "restitution, compensation and satisfaction, either singly or in combination." *Draft Articles on State Responsibility*, *supra* note 172, ch. II ("Reparation for Injury").

220. MCDOUGAL & FELICIANO, *supra* note 7, at 218. Some also have suggested that "good faith" ought to be used to evaluate state conduct in this context. *See, e.g.*, Shapira, *supra* note 56, at 74 (characterizing good faith, along with reasonableness, as "age-old legal concepts" applicable for "passing judgment on these motivations and grounds [for use of force in self-defense]"). *But see* CASSESE, *supra* note 14, at 152–53 (pointing out that the principle of good faith "does not specify how States must behave but merely conveys the idea that international subjects must not take advantage of their rights (or discharge their obligations) in such a way as to thwart the purpose and object of legal rules").

221. *See* MCDOUGAL & FELICIANO, *supra* note 7, at 218 ("[R]easonableness in particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors.").

should be final judge of its own actions";[222] (3) it represents the very type of behavior states have come to expect of one another and should expect of one another; and (4) it is a sufficiently versatile concept to cover all imaginable scenarios and contingencies.[223] At the same time, this Author would reject a purely subjective form of reasonableness—one based on an honest or genuine belief[224]—because it would be too prone to abuse.

2. Selecting a Type of Reasonableness

There are, then, three varieties of reasonableness from which to choose: (1) the strictly objective test of the "reasonable nation" in the situation at hand[225] (which appears to be the prevailing norm); (2) a two-pronged approach that calls for justification on independent objective and subjective grounds;[226] and (3) a hybrid test in which a state's subjective (actual) perception of a threat is evaluated objectively for its reasonableness under the circumstances.[227] The last approach is preferred.

The problem with the second view is that a state's subjective beliefs would be accorded a position of legal legitimacy on par with an objective assessment. The first choice, which rejects subjectivity altogether, ignores the reality that states facing significant threats to their security, especially when their very existence or sovereignty is at stake, typically do not act as detached, impartial actors that make decisions based on measured deliberation.[228] Instead, under such pressure, states' behavior often reflects a degree of desperation,

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222. Zedalis, *supra* note 159, at 150; *see also* Polebaum, *supra* note 11, at 212 (commenting that the reasonableness standard places a "premium on objectively verifiable evidence"). *But see* Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 237 (2003) ("[A] standard of reasonableness boils down to subjectivity and speculation.").

223. Reasonableness would apply whether a state used defensive force proactively, for example, on account of its survival, to protect its political sovereignty, to protect its citizens from harm, or to defend its military infrastructure.

224. *See* RODIN, *supra* note 28, at 42 (finding honest belief insufficient).

225. *See* Edward Miller, *Self-Defence, International Law, and the Six Day War*, 20 ISR. L. REV. 49, 60 (1985) (describing the "reasonable state" standard).

226. *See* Nabati, *supra* note 11, at 800 (requiring a defending state to have both "an actual and reasonable belief, as established by clear and convincing evidence, that self defense is justified"); Shapira, *supra* note 56, at 74–75 (asking whether defending state "genuinely and reasonably" believed that the other side was launching an attack or could launch an attack).

227. *See* Polebaum, *supra* note 11, at 208–09 (advocating the following standard: "whether the nation's perceptions were reasonable, given the actual circumstances under which it acted, and whether a reasonable nation with such perceptions would have acted the same way"); Zedalis, *supra* note 159, at 150 ("Legitimate reliance on self-defense requires that the state invoking the right actually perceive itself as threatened and that this perception be based on circumstances which would suggest its reasonableness.").

228. RODIN, *supra* note 28, at 42.

perhaps infused with a survival instinct. In addition, some states, because of their small size and prevailing sense of vulnerability, may understandably be more inclined, *ceteris paribus*, to use proactive force in the face of certain threats than would a large and powerful state with greater retaliatory capability.

Therefore, it is prudent to evaluate the exercise of self-defensive force with a mind toward such considerations, rather than from the perspective of a neutral observer, devoid of any particular national history or individualized orientation.[229] Indeed, "[i]n common law countries, the municipal law test concerning the state of mind of an individual invoking self-defense has both a subjective and an objective component."[230] Some commentators have drawn an analogy to "Battered Woman's Syndrome," in which courts have increasingly been open to expert testimony on the psychology of the accused in order to better ascertain her motivations in confronting a repeatedly abusive husband not immediately before an episode of abuse, but rather while the husband lies asleep or is otherwise defenseless.[231] In such instances, the battered woman's subjective mental perspective is then evaluated for its reasonableness. Notably, this approach need not be without limits regarding which factors can be considered as properly contributing to one's subjective state of mind in order to justify lethal conduct.[232]

3. Applying the Reasonableness Standard

It is not enough, however, to choose a particular type of reasonableness as the preferred standard; there also must be some guidelines for applying that standard. There are three key points in this respect.

i. *Scope of Application*. The hybrid reasonableness standard should be applied wholesale to the *conduct* of the "defending" state. The standard would evaluate principally whether that state actively and faithfully sought to avert hostilities by pursuing realistic alternatives to force, whether the nature and extent of the force actually employed was necessary and proportional, and whether the state's conduct complied with its international legal obligations.

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229. *See* KOLB, *supra* note 26, at 128 (noting that the concept of reasonableness varies by state based on its "own interests, history, contingencies of life with other nations, ideology, [and] geopolitical position").

230. Zedalis, *supra* note 159, at 150.

231. *E.g.*, Skopets, *supra* note 49, at 756–57 (analogizing preemptive strikes to battered woman's syndrome).

232. Polebaum, *supra* note 11, at 212 n.142 (referencing State v. Wanraw, 559 P.2d 548 (Wash. 1977), in which the court, in determining whether the defendant acted in reasonable self-defense in using lethal force against a home intruder, "refused to admit evidence of the effect of the defendant's Indian culture on her perceptions or actions").

Significantly, however, the standard of review would *not* apply to the state's threat assessment, because that determination would fall under the "clear and compelling" evidentiary standard.

ii. Factors for Consideration. It must also be clear which factors will be taken into account during the reasonableness review. This Author endorses the well-established "totality of circumstances" approach whereby all "relevant and determinative factors"[233] are assessed for their significance—not just selected ones.[234] Some commentators have expressed concern about the "malleable and boundless" nature of a "totality of the circumstances" test in other contexts,[235] but for the purposes of evaluating the lawfulness of the use of force, it is imperative to consider all pertinent facts bearing on that decision.

iii. Ex Ante Perceptions or Ex Post Reality? A separate but related issue is whether, in judging the exercise of force itself for its necessity and proportionality, the expected or the actual result should count. The key determinant should be what the defending state *ex ante* "reasonably anticipated" to occur. In practice, states determine whether to engage in proactive self-defense based on intelligence about the enemy, such as its stated or apparent intentions, the scale and deployment of its military forces, and so forth. In addition, military operations are often developed with imperfect information. Hindsight often reveals what was really being planned and what actually happened, but it is a luxury states facing threats to their security do not have, and it would, therefore, be inappropriate to apply such an unrealistically high standard.[236] Notably, that position is consistent with the rules of international humanitarian law[237] and would still permit a state to be held fully accountable for its actions on an objective basis.

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233. The U.S. Court of Appeals for the Federal Circuit treated the "totality of the circumstances" test and the "relevant, determinative circumstances" test as synonymous. Smith v. Principi, 343 F.3d 1358, 1362–63 (Fed. Cir. 2003).

234. *Contra* Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 65–66 (1998) (replacing "totality of the circumstances" test with a more tailored, two-pronged test for purposes of evaluating certain conduct in connection with the issuance of patents).

235. *E.g.*, Kathryn Zunno, United States v. Kincade *and the Constitutionality of the Federal DNA Act: Why We'll Need a New Pair of Genes to Wear Down the Slippery Slope*, 79 ST. JOHN'S L. REV. 769, 777–78 (2005) (discussing the Ninth Circuit's application of the totality of circumstances).

236. *See* DINSTEIN, *supra* note 5, at 192 ("The invocation of the right of self-defence must be weighed on the ground of the information available (and reasonably interpreted) at the moment of action, without the benefit of *post factum* wisdom."); Shapira, *supra* note 56, at 76 (stating that a state's determination that it is about to be attacked "must be examined in terms of the conditions prevailing at the time when the decision was taken, not with the wisdom of hindsight").

237. *See* Additional Protocol I, *supra* note 34, art. 51(5)(b) (measuring proportionality in terms of what "may be expected to cause incidental loss[es]").

D. *Summary of Proposal*

The following section summarizes the reform proposal as a unified whole.[238]

1. Substantive Elements

i. Gauging the Threat. To justify proactive self-defense, a state must demonstrate by "clear and compelling evidence" a "serious and urgent need" to exercise force based on the anticipated (1) nature and scale (including at least a *de minimis* level of anticipated force); (2) likelihood ("effective irrevocability"); and (3) timing ("last window of opportunity" available to avoid having one's security seriously compromised) of a threatened attack.

ii. Exhausting Peaceful Alternatives. Before launching a defensive first strike, a state must have actively and faithfully pursued to exhaustion, as an affirmative and continuing duty, any nonmilitary alternatives that are both objectively feasible and meaningful in order to repel the threat.

iii. Taking Responsive Action. Proactive defensive force must be (1) undertaken only if necessary, and then only to the extent strictly required to repel the threatened force; (2) reasonably capable of achieving that aim without in good faith causing more harm than roughly approximates the anticipated consequences posed by the threat itself; and (3) executed in full compliance with applicable international agreements and other legal obligations.

2. Procedural Safeguards

i. Burden of Proof. The burden of proof lies with the state that employs proactive self-defense.

ii. Requirement Prior to Taking Action. Before taking preemptive action, a state must refer its threat concerns to the Security Council to the extent possible, consistent with the standard for exhausting peaceful alternatives.

iii. Requirement After Taking Action. Following the use of preemptive force, a state must promptly report its "defensive" action to the Security Council and make available to the international community any nonobservable or nonpublic information (to the extent required in light of the understandable protection accorded sensitive intelligence sources and methods) relied upon to justify its action.

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238. Although this proposed standard is intended to govern the use of proactive self-defense by states, it may be applicable, to some extent, to measures taken by a collective security arrangement authorized by the Security Council pursuant to Chapter VII of the UN Charter as well.

iv. *Accountability*. To ensure at least some formal and enforceable accountability regarding proactive defensive force undertaken by a permanent member of the Security Council, consideration should be given to the establishment of binding international arbitration, specifically for cases where, but for exercise of its veto power, there would have been a unanimous Security Council vote finding a permanent member at fault for the unlawful use of force.

3. Standard of Review

It is recommended that states' efforts to resolve disputes peacefully, as well as the nature, severity, and duration of any proactive force subsequently undertaken, be reviewed for their lawfulness by the Security Council (or other appropriate collective body, whether political, adjudicative, or arbitral) under a "hybrid reasonableness" test, which would: (1) factor in the defending state's subjectivity in its objective review of conduct; (2) account for the "totality of circumstances"; (3) be applied on an *ex ante* basis; and (4) not accord any presumptions.

E. *Adoption of the Standard*

Having detailed the proposed standard of proactive self-defense, the feasibility of its adoption as the governing law is now considered. The two key considerations anchoring this analysis are the available vehicles of adoption and their likelihood of success.

1. Possible Vehicles

Five possible avenues of adoption exist for this (or, for that matter, any proposed) legal standard involving resort to self-defensive force. First, the standard could be adopted through an amendment to Article 51 of the UN Charter. The amendment procedure under the Charter presents a formidable and time-consuming challenge,[239] as it would require not only a two-thirds vote

239. To date, there has been virtually no political will to amend the Charter. *See* Henkin, *supra* note 106, at 57 ("The law of the Charter has not been formally amended. States generally have essentially maintained the original meaning of the Charter, both in formal resolutions of international bodies and in individual statements, and the International Court of Justice has largely reaffirmed it."). In addition, after hostilities in Kosovo ended, which arguably amounted to an exercise in humanitarian intervention—a type of force not expressly countenanced under the Charter—the Clinton Administration "did not argue for changing the law or institutions of the Charter." O'CONNELL, *supra* note 6, at 17; *see also* Cassese, *supra* note 52, at 520 (noting multiple failed efforts in the 1970s to update the Charter on the "issue of nuclear weapons").

of the General Assembly, but, more importantly, ratification "in accordance with their respective constitutional processes by two thirds of the Members of the United Nations."[240] Even if that process was satisfied, the proposed amendment would still require ratification by all five permanent members to become effective.[241]

Second, the standard could be incorporated into a universal (or near-universal) international agreement—independent of, but presumably including reference to, the UN Charter. However, this approach similarly would almost certainly encounter substantial resistance.[242]

Third, the Security Council or General Assembly could issue a statement of principles or set of guidelines governing when proactive self-defensive force would be deemed lawful. Such guidance, which would be merely hortatory, could be issued by the fifteen-member Security Council,[243] the five permanent members alone,[244] or a unanimous resolution of the General Assembly with the full concurrence of the permanent members.[245] Such a statement might build upon the High-Level Panel Report adopted by the UN Secretary-General.[246] This prospect seems equally improbable, largely for the same reasons that states would likely oppose the treaty vehicle.

Fourth, the Security Council (or General Assembly) could request an advisory opinion from the International Court of Justice[247] concerning lawful state practice with regard to proactive self-defense.

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240. U.N. Charter art. 108; *see also* Edward C. Luck, *Prospects for Reform: Principal Organs*, *in* THE OXFORD HANDBOOK ON THE UNITED NATIONS 653, 654 (Thomas G. Weiss & Sam Davis eds., 2007) (discussing the arduous process for amending the Charter).

241. U.N. Charter art. 108.

242. *See* Cassese, *supra* note 52, at 520 (identifying failures to effect international legislative change in the contexts of the 1970 Friendly Relations Declaration and the 1974 Definition of Aggression); Taylor, *supra* note 51, at 69 ("[T]o think of developing a new legally binding convention or protocol through the UN or a specially convened international intergovernmental conference is unrealistic."). In addition, the major powers are generally disinclined to clarify the prevailing standard on proactive self-defense because the more ambiguity that remains, the greater the operational latitude they continue to enjoy. *See supra* note 51 and accompanying text.

243. Garwood-Gowers, *supra* note 57, at 16–17.

244. David Sloss, *Forcible Arms Control: Preemptive Attacks on Nuclear Facilities*, 4 CHI. J. INT'L L. 39, 57 (2003).

245. CASSESE, *supra* note 65, at 363.

246. Significantly, the Report expressed the hope that individual states would subscribe to its guidelines, although they were primarily intended for use by the Security Council. *High-Level Panel Report*, *supra* note 10, ¶ 209.

247. Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. INT'L L. & DISPUTE RES. 100, 122 (2004).

This possibility, too, seems extremely remote[248] and, in any event, would be unlikely to provide more than abstract guidance on an issue that is not ideally suited to judicial determination in the first place.[249]

Fifth, the proposed standard could be incrementally adopted through the ongoing development of customary international law. For present purposes, evidence that qualifies as customary international law includes actions, statements, or positions[250] taken on behalf of a state by its official representatives. Statements alone, unaccompanied by the military acts of a given state, are deemed herein to possess probative value.[251] Accordingly, customary law would include state behavior through a combination of verbal statements, individual votes in international bodies, and real or purported instances of proactive self-defense.[252] To that end, it would be helpful if states, particularly on a collective basis through existing "alliance groupings," vocalized their support for this standard; such nonbinding declarations could at least hasten the development of a consensus.[253]

Although adoption of the proposed standard via customary law appears to be the most viable approach,[254] it could also take

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248. *See* Schachter, *supra* note 18, at 144 ("Neither governments nor their peoples are ready, by and large, to entrust their security and vital interest to foreign judges or international organs.").

249. *See*, *e.g.*, Nuclear Weapons Opinion, 1996 I.C.J. 226 (rendering an inconclusive, if not affirmatively unhelpful, opinion with respect to a query regarding whether the threat or use of nuclear weapons is ever permissible under international law).

250. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (6th ed. 2003) (noting that evidence of customary international law may include, e.g., diplomatic correspondence, press releases, military manuals, and policy statements). Although state acquiescence through silence can also contribute to these objective elements, interpreting silence can be precarious because it could signal indifference or indecision as easily as consent. *Id.* at 8.

251. *See* Mary Ellen O'Connell, *Taking* Opinio Juris *Seriously*, *in* CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE 14–15 (Enzo Cannizzaro & Paolo Palchetti eds. 2005) (stating that physical and verbal acts alike count toward the formation or change of customary international law). *But see* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 184 (June 27).

> The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law . . . . The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is *confirmed by practice*.

Id. (emphasis added).

252. *See Military and Paramilitary Activities*, 1986 I.C.J. 14, ¶ 207 (noting that customary international law accounts for both state actions as well as the conduct of "States in a position to react to [such actions]").

253. Taylor, *supra* note 51, at 69–70 (proposing, *inter alia*, "joint policy statements" by "NATO and the European Union").

254. *See* Bothe, *supra* note 222, at 236 (concluding that customary law offers a likely vehicle for change of a legal standard, citing by way of example the exclusive economic zones under the Law of the Sea).

considerable time, especially given the strongly held opinions and vastly diverse interests of states on this issue; would probably be disproportionately influenced by the major powers; would develop on a "piecemeal" basis;[255] and would likely remain only generally defined. In sum, while coherent and careful delineation of the permissibility of self-defensive force through multilateral agreement is preferable to slow, potentially slanted, ad hoc development, the Author remains skeptical of that prospect.

2. Likelihood of Success

In light of the role of customary law as the probably vehicle for adoption, the proposed reforms will stand a greater chance of success if they do not deviate considerably from the presumed existing standard. Upon close inspection, it is clear that the proposed and current standards actually have much in common. To draw this comparison as sharply as possible, the following commentary is divided into three parts: fundamental commonalities, clarifying provisions, and substantive distinctions.

i. *Fundamental Commonalities*. Areas in which the existing and proposed standards share basic features include: (1) the burden of proof; (2) the requirement that any responsive action be strictly necessary to respond to the perceived threat; (3) the need for any such action to comply with the applicable rules and obligations of international law; and (4) the requirement that a "defending" state publicly demonstrate ex post facto, to the extent appropriate, the evidence in support of a perceived threat. (Other comparable features exist between the two standards, characterized below as "clarifying provisions," as the new standard conceptually tracks the prevailing norms but does so while introducing greater precision.)

ii. *Clarifying Provisions*. One area in which the proposed approach provides greater specificity is the standard of proof used to gauge the threat. Rather than require something akin to the loosely defined "sound" evidence "capable of objective assessment,"[256] the proposed standard would establish a firmly grounded and widely understood legal standard entailing a demonstration by "clear and compelling" (or "clear and convincing") evidence.[257] In addition, while the new proposal would affirm the existing requirement that a defending state pursue all reasonably available peaceful means of

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255. *See* Cassese, *supra* note 52, at 520 ("Changes, if any, can only be introduced piecemeal . . . .").

256. *See supra* note 42 and accompanying text.

257. The Author acknowledges that the existing rule might already reflect the "clear and convincing" evidence test, *see id.*, but that remains open to debate. To the extent that it does not, the new proposal would have the additional benefit of perceptibly elevating the evidentiary threshold.

dispute resolution[258] before launching a proactive defensive strike, the new proposal would clarify that such nonmilitary alternatives must be both "objectively feasible and meaningful" and would treat this requirement as an "affirmative and continuing duty." The proposed approach would also make clear the degree of likelihood required before attack. Rather than something akin to "certain" or "near-certain,"[259] the standard would be "effective irrevocability," a high but operationally friendly threshold.

Further, the reform proposal would make explicit that, in connection with taking actions necessary and strictly tailored to repel the threat, a defending state must reasonably expect to succeed and limit its damage to a level roughly comparable to that expected to be inflicted by the threat. Finally, the new proposal would expressly require that the reasonableness standard be applied to evaluate the lawfulness of a state's actions taken on an ex ante basis and that it account for the "totality of circumstances."

iii. Substantive Distinctions. The reform proposal reflects two major departures from today's legal standard governing proactive self-defense between states. First, the *Caroline* notion of temporal imminence would be replaced by the more flexible concept of a state acting in the "last window of opportunity." Although this represents more than a marginal change, there is reason to believe that states are becoming more amenable to this view.[260] Second, the reform proposal would apply a hybrid reasonableness test to evaluate the permissibility of a state's exercise of proactive defensive force. This test would differ from the existing standard as it would inextricably link objective and subjective considerations—taking into account the defending state's sensibilities when judging its conduct objectively, rather than simply evaluating the state as an entirely neutral player. Although this feature would require a conceptual shift, it is possible that states, at some level, already factor in such subjective perceptions when weighing reasonableness[261] and may be

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258. *See supra* note 179 and accompanying text.

259. *See, e.g.*, Hofmeister, *supra* note 11, at 39–40 (describing the *Caroline* formula).

260. In light of Iraq's subsequent behavior, many states have reconsidered their initial criticism of Israel in its 1981 preemptive strike on Iraq's Osirak nuclear reactor. *See* FRANCK, *supra* note 108, at 106 (indicating states' reappraisal of Israel's conduct); Beres, *supra* note 85, at 99 ("[M]uch of the world, however grudgingly, has changed its assessment of Israel's 1981 air attack and of the associated objectives of preventing nuclear weapons proliferation."). In addition, the Security Council failed to condemn a four-day U.S. and U.K. bombing campaign in 1998 (known as Operation Desert Fox) against biological and chemical facilities in Iraq, even though no chemical or biological attack was known to be imminent. Rockefeller, *supra* note 72, at 134.

261. For example, one could contend that the international community's reasonably supportive reaction to Israel's first strike in the 1967 Six-Day War accounted for, among other factors, Israel's "mental state" as a country that had been embattled since the moment it won sovereignty (May 1948) and its survival was in no

increasingly inclined to do so as society at large becomes more psychologically attuned.[262]

VI. CONCLUSION

This Article has attempted to articulate a reformed legal standard to govern proactive self-defense. This standard-crafting exercise is important not only because of the potentially high stakes entailed in any use of military force, but also because the presumed standard for anticipatory self-defense is so vaguely defined that—as a consequence of their uncertain legal obligations—states are left to take greater liberties in exercising their right of self-defense, and may even end up offending principles of international law itself. This undertaking is particularly challenging given the prevailing ambiguities, the strongly held and competing perspectives concerning this body of law, and the difficulty in shaping a standard that would apply in any number of operational circumstances.

This Article began by identifying the current legal standard in order to establish a working baseline. It adopted, with caveats, the emergent standard that appears to approximate Webster's *Caroline* formula. That formula, which stands essentially for the basic elements of necessity, imminence, and proportionality—and little more—is viewed critically on several grounds, but chiefly for its lack of clarity (too much regarding what constitutes legally sanctioned defensive force) and failure to comport with legal realism (states are increasingly vulnerable to an undefended first strike).

Against that presumed standard, this Article identified a set of criteria that, in the aggregate, provided an analytical framework for a more robust and meaningful legal standard. The criteria necessitated a standard that is at once clear, flexible, comprehensive, and objective. In addition, the standard must be realistic both in order to meet contemporary security developments that have emerged since 1945 and to ensure that states will view it as legitimate. Finally, the standard must be shaped in such a way that it diminishes, rather than increases, the prospect of instability and armed conflict.

This Article then applied those factors operationally rather than conceptually by first outlining three substantive elements: gauging the threat, exhausting peaceful alternatives, and taking responsive

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way guaranteed. *See* ALEXANDROV, *supra* note 15, at 153–54 (outlining the support and critique's of Israel's first strike).

262. For instance, domestic courts have become increasingly receptive to hearing from expert witnesses about the psychology of a battered woman when evaluating the lawfulness of one murdering her husband even absent an imminent threat. *E.g.*, Skopets, *supra* note 49, at 756–57 (discussing the parallels between preemptive strikes and battered woman's syndrome).

action. The proposal supplied an evidentiary standard ("clear and compelling") and a standard of review (a hybrid-style "reasonableness" test), as well as a set of procedural safeguards. Although the proposal would grant states leeway on the urgency element by dispensing with temporal imminence, it would hold states to a clearer, and arguably no lower, threshold with respect to both the likelihood ("effective irrevocability") and the standard of proof required for a threatened attack. One should, therefore, view the proposal as a constructive realignment rather than as a radical departure from the existing baseline standard.

Finally, the proposal's utility will depend on its capacity for adoption as the governing law. In that regard, the gap between the presumed existing standard and the proposed standard overall is not significant and could reasonably be bridged over time. Doubtless, this is a substantively difficult, politically charged, and highly nuanced issue that will probably take many years and the occurrence of countless more armed conflicts before it can be settled in a meaningful way. In the meantime, states should seriously consider alternatives to the current standard, particularly ones that provide greater clarity and align more realistically with the twenty-first century's conditions of warfare. Otherwise, and until then, the heightened risk of hostilities, particularly those stemming from misunderstanding, error, and abuse in the exercise of defensive first strikes, will likely persist.